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NO. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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R. PULLEY, Warden of the California  
State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GEORGE DEUKMEJIAN,  
Attorney General  
ROBERT H. PHILIBOSIAN,  
Chief Assistant Attorney General  
Criminal Division  
DANIEL J. KREMER,  
Assistant Attorney General  
HARLEY D. MAYFIELD,  
Deputy Attorney General  
MICHAEL D. WELLINGTON,  
Deputy Attorney General

110 West "A" Street, Suite 700  
San Diego, California 92101  
Telephone: (619) 237-7666

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether, in addition to the procedures whereby a trial court and jury impose a death sentence, the Federal Constitution requires any specific form of "proportionality review" by a court of statewide jurisdiction prior to the execution of a state death judgment.

2. If so, what is the constitutionally required focus, scope, and procedural structure of such a review.



## TOPICAL INDEX

	<u>Pages</u>
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4 - 8
STATEMENT OF FACTS	8 -11
HOW THE FEDERAL QUESTION IS PRESENTED	11 -13
REASONS FOR GRANTING THE WRIT	13 -15
ARGUMENT	16 -46
I INTRODUCTION	16 -19
II AFTER A STATE DEFENDANT HAS BEEN SENTENCED TO DEATH UNDER A CONSTITUTIONALLY VALID TRIAL COURT PROCEDURE THERE IS NO ADDITIONAL CONSTITUTIONAL REQUIREMENT OF "PROPORTIONALITY REVIEW" BY THE STATE'S HIGHEST COURT	20 -29
III CALIFORNIA STATE LAW DOES NOT REQUIRE A "PROPORTIONALITY REVIEW" FOLLOWING A DEATH JUDGMENT AND EVEN IF IT DID IT WOULD PROVIDE NO BASIS FOR THE FEDERAL COURTS TO BLOCK AN EXECUTION	30 -37

TOPICAL INDEX  
(continued)

IV	EVEN IF SOME FORM OF "PROPORTIONALITY REVIEW" IS REQUIRED, THE NINTH CIRCUIT IS INCORRECT AS TO THE NATURE OF SUCH A REVIEW AND THE STATES REQUIRE THE GUIDANCE OF THIS COURT AS TO HOW SUCH A REVIEW MUST BE CONDUCTED	38 -41
V	THE NINTH CIRCUIT'S OPINION IN THIS CASE IS IRRECONCILABLY IN CONFLICT WITH THIS COURT'S OPINIONS AND THE OPINIONS OF THE FIFTH CIRCUIT	42 -46
	CONCLUSION	47

## TABLE OF AUTHORITIES

CASES	<u>Pages</u>
Brooks v. Estelle (5th Cir. 82-1613, filed December 6, 1982)	27, 38, 42
Brooks v. Estelle (United States Supreme Court A-504, filed December 6, 1982)	27
Brooks v. State (1979) 599 S.W.2d 312	26, 39
Engle v. Isaac ___ U.S. ___ (April 5, 1982) 50 U.S.L.W. 4376	31
Furman v. Georgia (1972) 408 U.S. 238	16
Gregg v. Georgia (1975) 428 U.S. 153	16, passim
In re Lynch (1972) 8 Cal.3d 410	33-34
Jurek v. State (1975) 522 S.W.2d 934	25, 39
Jurek v. Texas (1975) 428 U.S. 262	21, passim
People v. Easley (California Supreme Court No. Crim. 21117, filed December 10, 1982)	34, 35, 40

v.

TABLE OF AUTHORITIES  
(continued)

CASES	<u>Pages</u>
People v. Frierson (1979) 25 Cal.3d 142	32,33,34,40
People v. Jackson (1980) 28 Cal.3d 264	34
People v. Jackson (1980) 28 Cal.3d 264	32,34,36,40
People v. Wingo (1975) 14 Cal.3d 169	34
Proffitt v. Florida (1975) 428 U.S. 242	21, passim
Proffitt v. State (1975) 315 So.2d 461	24,39
Rockwell v. Superior Court (1976) 18 Cal.3d 420	32
Smith v. Balkcom (5th Cir. 1981) 660 F.2d 573	29
Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582	29
State v. Simants (1977) 250 N.W.2d 881	33

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Petitioner, R. Pulley, Warden  
of the California State Prison at San  
Quentin, respectfully requests that a  
writ of certiorari be issued to review  
the judgment and opinion of the United  
States Court of Appeals for the Ninth  
Circuit vacating the dismissal of Harris'

petition for writ of habeas corpus by the United States District Court for the Southern District of California, and ordering that the writ be granted unless the California Supreme Court conducts a "proportionality review" within 120 days. A petition for rehearing was denied November 15, 1982, and the opinion was modified. The suggestion for rehearing en banc was rejected. On November 29, 1982, the court of appeals granted a stay of the mandate until December 30, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, vacating the District Court's dismissal of Harris' petition for writ of habeas corpus (Harris v. Pulley, No. 82-5246 filed Sept. 16, 1982) appears as Appendix A to this petition. A copy of the Ninth Circuit's order denying the

petitions for rehearing and rejecting the suggestion for rehearing en banc, and modifying the original opinion appears as Appendix B to this petition. A copy of the order of the United States District Court for the Southern District of California appears as Appendix C to this petition.<sup>1/</sup>

#### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 16, 1982. A timely petition for rehearing, with suggestion for rehearing en banc, was denied November 15, 1982. This petition

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1. At the suggestion of the Clerk of this Court, at the same time as the filing of this present petition we have lodged with this Court ten copies of the opinion of the California Supreme Court affirming both the conviction and the judgment of death. This opinion, on direct appeal, was filed February 11, 1981, and is reported at 28 Cal.3d 935.

is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

1. United States Constitution, Amendments Five, Eight and Fourteen.

2. California Constitution, Article I, section 17.

The text of each of the above provisions is set forth in Appendix D to this petition.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County, California, Robert Alton Harris was charged with the kidnap, robbery, and murder of John Mayeski and Michael Baker. Harris was further charged with receiving stolen property, and being a convicted



felon in possession of a concealable firearm. It was additionally alleged that Harris had served a prior prison term for voluntary manslaughter, and that he was armed with and did personally use a firearm during the kidnap, robbery and murder of the two boys. Finally, with respect to each of the two counts of murder, special circumstances were alleged which qualified Harris for the death penalty. As to each murder it was alleged that the murder was committed during the commission of a robbery. It was also alleged that each murder was committed during the commission of a kidnap for the purposes of robbery. It was also alleged as to each murder that Harris was guilty of more than one murder.

Harris' trial began November 30, 1978, and on January 23 and 24, 1979,

the jury found him guilty of all counts, found to be true the allegations of a prior prison term and arming and use of firearms, found the two murders to be in the first-degree, and found the special circumstances alleged with regard to the murders to be true.

A penalty phase began January 29, 1979, and on February 8, 1979, the jury declared the penalty for each count of murder to be death. A motion for new trial was denied and a judgment of death was signed on March 6, 1979.

An automatic appeal from the judgment of death was taken to the California Supreme Court which, on February 11, 1981, affirmed the conviction and the judgment of death.

Harris pursued state habeas corpus through all three levels of California state courts, with his peti-

tion being denied by the California Supreme Court on January 13, 1982.

On March 5, 1982, (eleven days prior to his scheduled execution) Harris filed a 133 page petition for habeas corpus in the United States District Court for the Southern District of California. Following a hearing held March 12, 1982, the District Court found Harris' contentions to be legally without merit and dismissed the petition, granting a certificate of probable cause. On that same day the United States Court of Appeals for the Ninth Circuit, in a telephonic hearing, granted a stay of execution pending an expedited appeal to that court.

Briefs were filed on an expedited schedule in the Court of Appeals and, on May 11, 1982, oral argument was held in San Francisco. On September 16,

1982, the Court of Appeals issued its opinion vacating the District Court's dismissal of Harris' petition with instructions that the writ should be granted unless the California Supreme Court holds a "proportionality review" within 120 days of the filing of the opinion. Our petition for rehearing and suggestion for rehearing en banc were denied November 15, 1982, in an order which also modified the opinion. On November 29, 1982, a stay of the mandate was granted to December 30, 1982.

#### STATEMENT OF FACTS

The facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal. (People v. Harris (1981) 28 Cal.3d 935, 943-948.) These facts are not necessary to the determination of the issue presented in this petition.

Nonetheless, the following brief summary of Harris' crimes is offered to complete the context in which the present issue is presented.

In July of 1978 appellant had been on parole for six months from a previous homicide conviction when he and his younger brother decided to rob a bank in Mira Mesa, a suburb of San Diego. Just prior to committing the robbery Harris decided against using his own vehicle as a get-away car and, on the spur of the moment, decided to steal a car for that purpose. In the parking lot of a Jack-in-the-Box hamburger stand, across the street from the bank, he confronted John Mayeski and Michael Baker, two sixteen-year-old friends who were eating hamburgers in Mayeski's car prior to embarking on a day's fishing.

At gunpoint Harris kidnapped the two boys and drove them to a secluded area by a nearby lake where he executed them, shooting one boy in the back and chasing the other screaming youth into the brush where he too was shot to death. Harris then returned to the first youth where he took special relish in firing a final and unnecessary bullet into that boy's head just to see what the effect would be like. Harris then ate the breakfast of hamburgers which the dead boys had left, laughing at his younger brother for not having the stomach to do the same. Using the boys' car, Harris completed the bank robbery, but was followed by customers of the bank to the home in Mira Mesa where he had been staying. He was promptly apprehended.

Harris confessed six times before trial and once again during the

penalty phase. The sixth and seventh confessions were interrupted by his testimony during the guilt phase where he denied killing the boys and blamed his younger brother for it. In the penalty phase it was also shown that while in jail awaiting trial Harris sodomized and threatened to kill a fellow inmate and was twice caught in possession of deadly weapons, first a knife, then a wire garrote. He also staged a sham suicide attempt, cutting his forearm and mixing the blood with a large amount of water to provide the necessary melodrama.

HOW THE FEDERAL QUESTION IS PRESENTED

Harris invoked the United States District Court's jurisdiction under 28 U.S.C. section 2254 by filing a petition for writ of habeas corpus March 5, 1982. In this petition, inter alia, Harris complained that he had been denied

a "proportionality review", alleging that such a review is required by the Federal Constitution.

On dismissal of his petition by the District Court an appeal was taken to the United States Court of Appeals for the Ninth Circuit where the same issue, inter alia, was presented.

In its opinion, the Ninth Circuit ruled that California's death penalty statute is constitutional, but that a "proportionality review" is required both under state law, and under the federal constitution as amplified by this Court's decisions in Gregg v. Georgia (1975) 428 U.S. 153; Proffitt v. Florida (1975) 428 U.S. 242; and Jurek v. Texas (1975) 428 U.S. 262. The ruling of the Ninth Circuit precludes the imposition of the death sentence against Harris unless the California Supreme Court con-



ducts a "proportionality review" within 120 days. Petitioner urges that California's statutory scheme meets all the requirements of Gregg, Proffitt and Jurek, and that no additional "proportionality review" is required.

REASONS FOR GRANTING THE WRIT

The opinion of the Ninth Circuit holds that, in addition to the established trial court procedures designed to give capital juries adequate information and guide their discretion, the highest court of each state must conduct a separate and distinct "proportionality review" under the compulsion of the federal constitution. This decision is in conflict with the decisions of this Court. In both Gregg and Proffitt "proportionality review" was portrayed as a useful but constitutionally unnecessary additional safeguard

to the procedures implemented at the trial level. In Jurek, this Court approved the Texas death penalty system which contains no provisions whatsoever for proportionality review.

The Ninth Circuit's opinion also conflicts with the decisions of both this Court and the United States Court of Appeals for the Fifth Circuit denying relief to and allowing the execution of Texas prisoner Charlie Brooks without Brooks ever having been afforded the "proportionality review" referred to in the present case. (Brooks v. Estelle (5th Cir. No. 82-1613 decided December 6, 1982; Brooks v. Estelle United States Supreme Court number A-504, application for stay and petition for certiorari denied December 6, 1982.)

The issue is a vastly important one of nationwide concern since the Ninth

Circuit is the first circuit to specifically hold that "proportionality review" is constitutionally mandated. Since this Court has approved of the Texas system which contains no such review, and has allowed a protesting petitioner's execution under that system all states are once again at sea on the issue of what is constitutionally required for the valid execution of a death judgment. Only this Court can settle that question.

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## ARGUMENT

### I

#### INTRODUCTION

It has been well over a decade that the efforts of the states of this union to afford their citizens the much desired protections of capital punishment have labored under a dark constitutional cloud. This has been a time of judicial confusion over the evolving standards that our federal Constitution imposes on the ability of the states to defend themselves by executing their most vicious murderers. From Furman v. Georgia (1972) 408 U.S. 238 through the series of cases led by Gregg v. Georgia (1975) 428 U.S. 153 the citizens of California and its sister states have repeatedly and unequivocally gone to the polls to express their mounting concerns for their personal safety and their judgment that

capital punishment is appropriate, desired, and needed.

Following Gregg, California enacted yet another death penalty statute in 1977. Robert Alton Harris was tried and condemned under this statute, and his case is the first to have travelled the gauntlet of state and federal courts testing the validity of the California system.

The validity of the California death penalty statute has been upheld at every step of state and federal review, including the most recent opinion of the United States Court of Appeals for the Ninth Circuit. However, the Ninth Circuit has held, for the first time anywhere, that in addition to the validity of the trial court procedures which, in response to Gregg, ensured the submission of adequate information to the

sentencing authority and properly guided the discretion of that authority, an additional procedure is required. Based on the fortuitous appearance of a "proportionality review" in the Georgia statute examined in Gregg, and based on Florida case law described by this Court in Proffitt v. Florida (1975) 428 U.S. 242, the Ninth Circuit has held that the federal constitution precludes the execution of a state death judgment until the highest court of that state has conducted a separate and discrete "proportionality review" designed to compare the given case with other cases in the state to determine whether the penalty in the given case is proportionate to other sentences imposed for similar crimes. (Appendix A, p. 20.)

Thus the uncertainty continues after more than a decade of effort. As

we will show in this petition, this Court has approved the Texas statutory scheme which contains no such "proportionality review". Furthermore, both the Fifth Circuit and this Court have allowed the execution of a Texas inmate in the face of his complaints concerning the lack of such a "proportionality review". In face of this background, an obviously intolerable conflict exists which only this Court can resolve.

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II

AFTER A STATE DEFENDANT HAS BEEN SENTENCED TO DEATH UNDER A CONSTITUTIONALLY VALID TRIAL COURT PROCEDURE THERE IS NO ADDITIONAL CONSTITUTIONAL REQUIREMENT OF "PROPORTIONALITY REVIEW" BY THE STATE'S HIGHEST COURT

After years of uncertainty as to the constitutional requirements of a valid state death penalty statute this Court made the requirements relatively clear in a series of 1975 cases led by Gregg v. Georgia (1975) 428 U.S. 153. In that case, which clarified previous holdings on the subject this Court concluded:

"In summary, the concerns expressed in Furman [v. Georgia (1972) 408 U.S. 238] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these



concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, at p. 195.)

In Gregg, this Court approved the statutory scheme providing for the imposition of the death penalty in Georgia. The court also approved the schemes of Florida (Proffitt v. Florida (1975) 428 U.S. 242) and Texas (Jurek v. Texas (1975) 428 U.S. 262.) In all three cases, the court concluded that the statutory scheme surrounding the imposition of the death penalty in Georgia, Florida, and Texas ensured that the sentencing authorities in those states would be provided with adequate information and sufficient guidance to guard against the

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arbitrary and capricious implementation of the death penalty.

However, in Gregg this Court noted that the Georgia statute has, "an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group . . . ." (Gregg v. Georgia, supra, at p. 204.) This provision is the statutory proportionality review, and every reference to it by this Court makes it apparent that it was seen as merely frosting on an already constitutional cake. Every reference to it is punctuated by the word "additional": "An important additional safeguard" (Gregg v. Georgia, supra, at p. 198), "an additional provision" (Gregg v. Georgia, supra, at p. 204), "in addition, the review function of the Supreme Court of

Georgia affords additional assurance . . .  
. ." (Gregg v. Georgia, supra, at p. 207.

Furthermore, in Proffitt this Court noted that the Florida statute contained no such "proportionality review" provision. However, the statute did provide for an automatic review by the state supreme court, which court, "considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under the similar circumstances in another case . . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' State v. Dixon 283 So.2d 1, 10 (1973)." (Proffitt, supra, at p. 271, emphasis added.)

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Thus, in Florida although there is no statutory or case law requirement that a "proportionality review" be conducted in each case, the state supreme court has declared that it has the power to provide such a review in an appropriate case. It is significant to note that in deciding the Proffitt case, the Florida Supreme Court made no mention whatsoever of "proportionality review", and there is no indication that any specific review was done at the state level in that case. (Proffitt v. State (1975) 315 So.2d 461.)

In Jurek, the Texas statute provided for no "proportionality review" whatsoever, and there is no indication that the Texas Court of Criminal Appeals considered such a review its responsibility. Specifically, a reading of the Jurek case as it was decided by the Texas

Court of Criminal Appeals reveals that no consideration whatsoever was given to any form of "proportionality review".

(Jurek v. State (1975) 522 S.W.2d 934.)

Rather, the Texas scheme was approved by this Court with no more showing than that, "by providing a prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-ended rational, and consistent imposition of death sentences under law." (Jurek v. Texas, supra, 428 U.S. at p. 276.)

It seems clear from a reading of Gregg and Proffitt that "proportionality review" as it exists in those states was not deemed by this Court to be an essential element to the constitutional validity of their death sentence schemes. This conclusion is made virtually inescapable, however, by a reading

of this Court's opinion in Jurek. As this Court discussed the Texas scheme no mention whatsoever was made of "proportionality review". It is apparent that none exists in Texas, and it is apparent from this Court's opinion in Jurek that its absence in no way lessened the constitutional validity of that state's system.

Recent litigation involving a Texas inmate further underscores the conclusion that this Court has not required any "proportionality review" as a prerequisite to execution of a state death judgment. On December 7, 1982, Texas executed Charlie Brooks. It is apparent from a reading of the opinion of the Texas Court of Criminal Appeals in Brooks' case (Brooks v. State (1979) 599 S.W.2d 312) that no express "proportionality review" was conducted by

the Texas court in that case. After a denial of federal habeas corpus relief, the United States Court of Appeals for the Fifth Circuit denied him a stay to pursue a leisurely appeal and ruled against him on the merits of his expedited appeal. (Brooks v. Estelle (5th Cir. 82-1613, filed December 6, 1982).) Finally, this Court denied Brooks' application for stay and denied his petition for writ of certiorari in the face of his complaint that he had been denied the very "proportionality review" that the Ninth Circuit has ordered California to provide in this case. (Brooks v. Estelle United States Supreme Court A-504, filed December 6 1982.)

Thus, it has been made clear that this Court will uphold state death penalty schemes which do not include a separate "proportionality review" follow-

-ing the trial. In fact, both the Fifth Circuit and this Court have made it clear that executions will be allowed without the necessity of conducting the sort of "proportionality review" ordered by the Ninth Circuit here.

The reasons for this are clear. The goal of "proportionality review" is the same goal sought by the sentencing procedures which have been deemed to be constitutionally required. Thus, when a state statute provides that the sentencing authority will be given all relevant information, and then adequately guides the sentencing authority's exercise of its discretion that alone satisfies our fundamental constitutional concerns that decisions to impose the death penalty will be based on the particularized nature of the crime and the defendant, and that the decision will be



properly channelled to avoid wanton and freakish results. (See, Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582; Smith v. Balkcom (5th Cir. 1981) 660 F.2d 573.)

While it is perfectly proper for the Georgia Legislature to provide an additional safeguard, and is proper for the Florida Supreme Court to stand ready to make an additional examination in a proper case, such procedural matters are in excess of minimum constitutional demands, and are matters of individual state prerogative.

\* \* \* \* \*

III

CALIFORNIA STATE LAW DOES  
NOT REQUIRE A "PROPORTIONALITY  
REVIEW" FOLLOWING A DEATH  
JUDGMENT AND EVEN IF IT DID  
IT WOULD PROVIDE NO BASIS FOR  
THE FEDERAL COURTS TO BLOCK AN  
EXECUTION

The Ninth Circuit opinion displays an alarming lack of clarity as to the basis for its holding requiring the conduct of a "proportionality review" by the California Supreme Court. Most of the Ninth Circuit's language appears to be based on a conclusion that the California Supreme Court has itself established a requirement under state law to conduct a proportionality review. (Appendix A, pp. 2, 20, 56.) In fact, the only language in the Ninth Circuit's opinion that can be read as a suggestion that the proportionality review requirement springs from the federal constitution is the en passant obser-

vation that the California Supreme Court, "gave no indication that any type of proportionality review, as required under Gregg v. Georgia and Proffitt v. Florida, was undertaken." (Appendix A, p. 21.)

Since it is fundamental that such a state law rule, if it existed, would not be a proper basis for federal intervention, (see Engle v. Isaac \_\_U.S.\_\_ (April 5, 1982) 50 U.S.L.W. 4376) we focus our discussion here on the question of "proportionality review" under the federal constitution. However, given the language of the Ninth Circuit's opinion it seems appropriate to demonstrate that the California Supreme Court has clearly not assumed any obligation under any body of law to conduct the kind of "proportionality review" ordered by the Ninth Circuit.

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Since this Court's series of cases led by Gregg v. Georgia, supra, it has been popular among death defendants to argue that "proportionality review" is constitutionally required. In People v. Frierson (1979) 25 Cal.3d 142, and People v. Jackson (1980) 28 Cal.3d 264, the California Supreme Court was presented with arguments that "proportionality review" was constitutionally required but that the California death penalty system operated to preclude the California Supreme Court from filling this supposedly required function. In the face of this argument the California Supreme Court in Frierson began with a citation to its previous decision in Rockwell v. Superior Court (1976) 18 Cal.3d 420, 432, "wherein we express our own doubt that proportionality review was deemed essential by a majority of the

justices in Gregg . . . ." (People v. Frierson, supra, at p. 181.) The California Supreme Court went on to note that this Court has either expressly approved, or has denied certiorari with regard to state schemes which include no more "proportionality review" than a court system willing to examine proportionality when the issue arises. (People v. Frierson, supra, at p. 182; see e.g. State v. Simants (1977) 250 N.W.2d 881, 890.)

However, notwithstanding the California State Supreme Court's conclusion that "proportionality review" is not required, the court in Frierson went on to note that it had full power to conduct such a review under, "well established proportionality principles of general application" established by California State Supreme Court cases (In re Lynch

(1972) 8 Cal.3d 410, People v. Wingo  
(1975) 14 Cal.3d 169) designed to imple-  
ment state constitutional provisions.  
(Cal. Const., Art. I, § 17, cruel and  
unusual punishment proscription.) This  
holding was reaffirmed in People v.  
Jackson (1980) 28 Cal.3d 264 at p. 317.)

Very recently, and apparently  
spurred in part by the Ninth Circuit's  
decision in this case, the California  
Supreme Court has once again addressed  
the issue of "proportionality review".  
In People v. Easley (California Supreme  
Court No. Crim 21117, filed December 10,  
1982) the California Supreme Court  
affirmed both the conviction and death  
judgment. In a concurring opinion  
Associate Justice Kaus reaffirmed that  
the decisions in Frierson and Jackson do  
not constitute holdings that any  
"proportionality review" is required

under either federal or state law, but rather merely constituted holdings that the California Supreme Court was not precluded from holding such a review in an appropriate case. Indeed, Justice Kaus echoed the California Supreme Court's previous doubts that this Court has ever required "proportionality review." Then, having discussed this total lack of authority on the issue of "proportionality review" Justice Kaus cited directly to the Ninth Circuit opinion in this case, most particularly the Ninth Circuit's conclusion that the California Supreme Court has required itself to do such a proportionality review. In apparent consternation Justice Kaus added, "I hasten to note that the Harris decision is not yet final." (People v. Easley typed opinion of Justice Kaus, p. 5, fn. 6.)

It is thus apparent that neither the California Legislature nor the California Supreme Court has established any right to a "proportionality review" following a judgment of death. Furthermore, the California Supreme Court has expressed grave doubts that such a requirement exists under the federal constitution. Even though the California Supreme Court has said, "We stand fully prepared to afford what ever kind of proportionality review may be held constitutionally mandated by the high court." (People v Jackson 28 Cal.3d at p. 317), as we previously demonstrated this Court has not required any kind of proportionality review at all.

In the face of this, the Ninth Circuit has created an impossible situation. Disagreeing with the



California Supreme Court as to the California Supreme Court's interpretation of California law, the Ninth Circuit has ordered the overturning of the present death sentence unless California implements a state law which the California Supreme Court says does not exist.

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IV

EVEN IF SOME FORM OF  
"PROPORTIONALITY REVIEW IS  
REQUIRED, THE NINTH CIRCUIT IS  
INCORRECT AS TO THE NATURE OF  
SUCH A REVIEW AND THE STATES  
REQUIRE THE GUIDANCE OF THIS  
COURT AS TO HOW SUCH A REVIEW  
MUST BE CONDUCTED

Although it seems clear from  
this Court's actions in Jurek and Brooks  
that no additional "proportionality  
review" is required, if some such review  
is required the states are in dire need  
of some guidelines as to what form it  
must take. Such guidelines can only pro-  
perly be provided by this Court.

The Ninth Circuit has ruled  
that the California Supreme Court has  
defaulted in its constitutional duty  
because the opinion of the California  
Supreme Court on direct appeal does not  
indicate that any "proportionality  
review" has been conducted. Yet this

Court has approved the death penalties in Jurek and Proffitt where the highest state court opinions make no more mention of "proportionality review" than does the California opinion in this case. (See Jurek v. State (1975) 522 S.W.2d 934 and Proffitt v. State (1975) 315 So.2d 461.) Furthermore, this Court has allowed the actual execution of Charlie Brooks whose appellate opinion is likewise devoid of any evidence of a "proportionality review". (Brooks v. State (1979) 599 S.W.2d 312.)

It is apparent that if some sort of review is required, at least the Ninth Circuit is incorrect in assuming that the state's highest court is under a mandatory obligation to conduct it automatically and on the record in every case. Of course this does not begin to

address the question of what kind of review might be required, if any is.

The California Supreme Court in its decisions in Frierson, Jackson, and Easley has made it clear it is fully willing to conduct any sort of review this Court requires. The Ninth Circuit has required the California Supreme Court to conduct such a review, but has still provided no guidelines as to the constitutionally required focus, scope and procedural structure of such a review. If the federal constitution is to be read to require such a review it is absolutely necessary that the states be given the guidance only this Court can provide before embarking on the process of conducting such reviews.

In deciding what, if any, such review is required it must be remembered that the forces in moral opposition to

capital punishment have made it no secret that one of their primary legal tactics is to make capital punishment litigation so lengthy, expensive, burdensome, and complex that it will simply be beyond the fiscal means of government to execute. It is easy to see that "proportionality review" would be an ideal vehicle for delivering the coup de grace to our already sagging system.

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V

THE NINTH CIRCUIT'S OPINION  
IN THIS CASE IS IRRECONCILABLY  
IN CONFLICT WITH THIS COURT'S  
OPINIONS AND THE OPINIONS OF THE  
FIFTH CIRCUIT

As we have already demonstrated the opinions of this Court in Jurek and Brooks make it clear that executions are constitutionally permissible without the sort of "proportionality review" demanded by the Ninth Circuit in the present case. Thus the Ninth Circuit opinion in this case is irreconcilably in conflict with the past decisions of this Court. Furthermore, the present decision is in irreconcilable conflict with the decision of the Fifth Circuit upholding the penalty of death in Brooks v. Estelle (5th Cir. No. 82-1613 filed December 6, 1982).

Even if some sort of proportionality review is required, the deci-

sion in this case is still in conflict with the decisions of this Court and of the Fifth Circuit in that it requires an automatic, on-the-record "proportionality review" conducted in each case by the state's highest court. As previously indicated, neither this Court nor the Fifth Circuit have required this in the cases that have come before them.

The conflict is so dramatic and unavoidable on a subject of such great national concern that a hearing by this Court is imperative.

In its historical context, the importance of this issue can not be underestimated. For substantially over a decade, the constitutional right of American citizens to seek the protections of capital punishment has been in limbo. As the rate of violent crime has increased in our nation American citizens

have watched with increasing frustration as their clear and unambiguous efforts to establish valid death penalty laws have been met with delay, detour and defeat.

While it is true that the past decade has been a time of hesitant judicial rethinking of our national attitudes toward capital punishment, it has also been a time of increased frustration on the part of our citizens, who have no doubt at all about capital punishment and who seek to have some impact, through their government, on the most fundamental issues of personal security.

After well over a decade of clear and determined efforts to establish valid capital punishment procedures this entire nation has been unable to achieve more than a tiny handful of executions out of literally hundreds of death judgments. The vast majority of these



were volunteers who chose not to fight their executions.

Californians and all Americans deserve to have the issues settled as to what basic procedures are required by the federal constitution prior to the execution of a death judgment. Although this Court's decisions in Gregg, Proffitt, and Jurek purported to do that, the Ninth Circuit's opinion in the present case raises a whole new stumbling block affecting the majority of death judgments throughout the nation. The present case presents this Court with an opportunity to rebuild the public's confidence in its government and to prevent the waste of increasingly precious public resources which would be occasioned by prolonging the indecision over capital punishment. The time has come for the

- 46 -

matter to be settled and for us, as a  
nation, to get on with it.

\* \* \* \* \*

CONCLUSION

Because the Ninth Circuit has wrongly decided a crucial issue in a manner directly in conflict with the previous decisions of this Court and the Court of Appeals for the Fifth Circuit, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

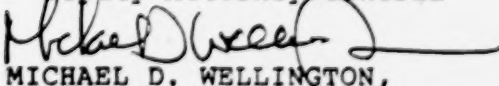
Respectfully submitted,

GEORGE DEUKMEJIAN,  
Attorney General

ROBERT H. PHILIBOSIAN,  
Chief Assistant  
Attorney General  
Criminal Division

DANIEL J. KREMER,  
Assistant Attorney General

HARLEY D. MAYFIELD,  
Deputy Attorney General

  
MICHAEL D. WELLINGTON,  
Deputy Attorney General

Attorneys for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian,  
Attorney General  
Michael D. Wellington,  
Deputy Attorney General

110 West "A" Street, Ste 700  
San Diego, California 92101

No. \_\_\_\_\_  
R. PULLEY,  
Petitioner,

v.

ROBERT ALTON HARRIS,  
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT: an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Michael J. McCabe  
108 Ivy Street  
San Diego, CA 92101

American Civil Lib. Union  
Quin Denvir  
State Public Defender  
1390 Market St., Ste 425  
San Francisco, CA 94102

American Psychiatric Assoc.  
H. Bartow Farr III  
Onok, Klein & Farr  
2550 M. Street, N.W.  
Washington, D.C. 20037

Edwin L. Miller  
District Attorney  
San Diego County  
Post Office Box X-1011  
San Diego, CA 92112

County Clerk, San Diego County  
Post Office Box 128  
San Diego, CA 92112  
TO BE DELIVERED TO  
JUDGE ELI H. LEVENSON

California Supreme Court  
350 McAllister St., Rm. 4050  
San Francisco, CA 94102

U.S. District Court  
Southern District  
U.S. Courthouse  
940 Front Street  
San Diego, CA 92189  
TO BE DELIVERED TO  
JUDGE ENRIGHT

U.S. Court of Appeals  
Ninth Circuit  
7th and Mission Streets  
P.O. Box 547  
San Francisco, CA 94101

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 28 day of December 1982.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

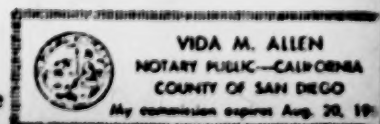
Dated at San Diego, California, December 28, 1982.

Clifford E. Reed, Jr.  
CLIFFORD E. REED, JR.

Subscribed and sworn to before me  
this 28th day of December, 1982.

Vida M. Allen

Notary Public in and for said County and State



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82-1095

Office - Supreme Court, U.S.

FILED

DEC 29 1982

ALEXANDER L. STEVAS.  
CLERK

NO. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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R. PULLEY, Warden of the California  
State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

---

APPENDICES TO PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

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GEORGE DEUKMEJIAN,  
Attorney General  
ROBERT H. PHILIBOSIAN,  
Chief Assistant Attorney General  
Criminal Division  
DANIEL J. KREMER,  
Assistant Attorney General  
HARLEY D. MAYFIELD,  
Deputy Attorney General  
MICHAEL D. WELLINGTON,  
Deputy Attorney General

110 West "A" Street, Suite 700  
San Diego, California 92101  
Telephone: (619) 237-7666

Attorneys for Petitioner

APPENDIX A

[Filed September 16, 1982]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 82-5246

D.C. # CV 82-0249-WBE

OPINION

ROBERT ALTON HARRIS,	)
	)
Petitioner,	)
	)
v.	)
	)
R. PULLEY, Warden of the	)
California State Prison at	)
San Quentin,	)
	)
Respondent.	)

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Appeal from the United States  
District Court for the  
Southern District of California

William B. Enright, District Judge,  
Presiding

Argued and submitted May 11, 1982

Before: CHOY, ANDERSON, and CANBY,  
Circuit Judges.

PER CURIAM:

Robert Harris, a California state prisoner who was sentenced to death for the murder of two teenage boys, appeals from the district court's denial of his habeas corpus petition brought under 28 U.S.C. § 2254. Because the California Supreme Court did not undertake a proportionality review of the application of the death penalty in this case, we vacate the district court's denial of the petition and instruct the district court to remand the case to the California Supreme Court to enable it to undertake the proportionality review established in People v. Frierson, 25 Cal. 3d. 142, 183 (1979) (plurality opinion), and People v. Jackson, 28 Cal.3d 264, 312 (1981). If it becomes necessary, the district court should examine the California Supreme Court's proportionality decision to make certain



that it is consistent with Proffitt v. Florida, 428 U.S. 242 (1976), and Gregg v. Georgia, 428 U.S. 153 (1976). To facilitate the district court's consideration of the numerous other issues Harris has raised, if such is necessary, we also review his other contentions.

I.           The Constitutionality of the California Death Penalty Statute

California has established by statute an elaborate procedural mechanism for the imposition of the death penalty. If a jury convicted the defendant of first degree murder, the same jury must also determine the penalty. Cal. Penal Code § 190.4 (Deering 1977).<sup>1/</sup> Even if the trial judge acted as the fact finder, a jury must determine the penalty unless the defendant waives this right. Id. Once the defendant has been found guilty of first degree murder and a jury is

determining the penalty, the procedure is divided into two stages. First, the jury must determine the truth of any special circumstances the prosecution has charged. Id. § 190.1(b). The jury cannot impose the death penalty unless it first finds at least one statutorily-specified special circumstance to be true beyond a reasonable doubt. Id. If it finds the special circumstance true, the jury must then move to the second stage: reviewing the mitigating and aggravating circumstances to determine whether the death penalty should be imposed. Id. § 190.3. Although the statute does not limit the additional aggravating or mitigating evidence which the prosecution or the defendant may present, the statute enumerates several factors the jury must consider in reaching its decision. Id. Having heard and reviewed the evidence, the jury then

determines whether the penalty shall be death or life imprisonment without the possibility of parole. Id.

Once the jury finds that the death sentence should be imposed, the trial judge reviews the evidence to determine whether the jury's findings and verdict are supported by the evidence. The judge must then state on the record the reasons for the findings. Id. § 190.4(e). The statute also provides for an expeditious, automatic appeal to the California Supreme Court, although the scope and content of the review the court must give is not defined. Id. § 190.6.

Harris argues that this procedure for imposing the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment made applicable to the State of California by the fourteenth amendment

because the procedure does not guide jury discretion to produce rational or consistent death sentences. In particular, Harris contends that the 1977 capital-punishment statute under which he was sentenced is deficient because (1) it fails to provide unambiguous objective standards to guide and focus the sentencing authority's discretion; (2) it fails to establish the burden of proof a fact finder must use in weighing the aggravating and mitigating circumstances; (3) it fails to require the sentencing authority to furnish a written statement of the basis upon which it decided to impose the death penalty; and (4) it fails to provide for meaningful and effective proportionality review.

We review the constitutionality of California's 1977 death-penalty statute on the basis of the standards

established in Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976) and their progeny. The primary concerns the Court has expressed in discussing the death penalty have been the need for guidance of the fact finder's discretion and an opportunity for review of the exercise of that discretion. The Court has thus upheld statutes providing for jury consideration of aggravating and mitigating factors, written findings stating reasons for imposition of the penalty, and a procedure designed to ensure proportionality review. See Lockett v. Ohio, 438 U.S. 586 (1978); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). These are, then, the guiding principles we follow in determining the

/

constitutionality of a state's death-penalty statute.

A. Objective Standards

Harris contends that the California death-penalty statute violates the eighth and fourteenth amendments because it places no limit on the prosecution's introduction of evidence of aggravating factors. Cal. Penal Code § 190.3. Harris also argues that the statute's failure to require that the jury specify whether the factors the jury considers in imposing the death penalty are mitigating or aggravating impermissibly broadened the jury's discretion. We reject both of these contentions.

The California statute does not limit the introduction of evidence of either mitigating or aggravating circumstances, but it does require that certain specified factors be taken into

account. Id. The California Supreme Court has interpreted this section as not limiting the admission of evidence to matters relevant to the specified mitigating or aggravating factors.

People v. Murtishaw, 29 Cal.3d 733, 773 (1981).

The United States Supreme Court has upheld a death-penalty statute that permitted a jury to consider any aggravating or mitigating circumstance otherwise authorized by law so long as one statutory aggravating factor was identified before the death penalty was imposed. See Gregg v. Georgia, 428 U.S. at 206 (plurality opinion noting terms of statute). In Proffitt v. Florida, the Court also upheld a sentencing statute that allowed the jury to consider nonstatutory, aggravating factors. See Proffitt v. Florida, 428 U.S. at 256-57

n.14 (suggesting that consideration is proper as long as penalty not based solely on nonstatutory factors). And a plurality of the Supreme Court has noted that, to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors. See Lockett v. Ohio, 438 U.S. at 608.

These cases suggest that, although the irregular or selective application of the penalty is to be avoided, the consideration of nonstatutory mitigating or aggravating circumstances is not objectionable in itself, as long as at least one statutory circumstance is found before the death penalty is imposed. Because the judge found several statutory aggravating circumstances in this case, we see no constitutional problem here. Moreover,



under the statute, the jury must consider certain factors in weighing aggravating and mitigating circumstances, see Cal. Penal Code § 190.3. These required factors provide jury guidance and lessen the chance of arbitrary application of the death penalty.

We note that the Fifth Circuit seems to have decided that the consideration of nonstatutory aggravating circumstances impermissibly increases jury discretion. See Henry v. Wainright, 661 F.2d 56, 58-60 (5th Cir. 1981) (introduction and consideration of nonstatutory aggravating factors error under Florida sentencing statute), vacated and remanded on other grounds, 50 U.S.L.W. 3981 (1982). To the extent our conclusion here is inconsistent with Henry v. Wainright, we reject the Fifth Circuit's ruling.

Nor do we think that the statute's failure to label factors as aggravating or mitigating invalidates the statute. The Supreme Court has previously upheld a statute that did not explicitly identify factors as aggravating or mitigating but merely asked the jury to answer several particular questions. See Jurek v. Texas, 428 U.S. at 270-73 (plurality opinion). Because the California statute establishes factors to guide the jury's discretion and allows for consideration of the particular aggravating and mitigating circumstances in this case, the statute is not unconstitutional in this respect.

B. Burden of Proof

Harris contends that the statute's failure to specify the state's burden of proof in the second sentencing stage, determining whether the aggra-

vating factors outweigh the mitigating ones, violates due process because it results in jury capriciousness. He argues that the state must prove beyond a reasonable doubt that the death penalty is appropriate. These contentions are without merit.

Although the statute does not specify the burden of proof at the second stage, it does require use of the beyond-a-reasonable-doubt standard in the first sentencing stage where the truth of any special circumstance is determined. Unless a jury is convinced beyond a reasonable doubt of the truth of at least one special circumstance charged, it cannot even consider whether to impose the death penalty. Cal. Penal Code § 190.4(a). The statute then requires a jury to consider and take into account all mitigating and aggravating factors in

determining whether to impose the death penalty. Id. § 190.3. And while the statute does not specify the burden of proof, a plurality of the California Supreme Court has read the statute as requiring the jury to weigh these factors before imposing the penalty. See People v. Frierson, 25 Cal.3d at 180. These procedures guarantee that the jury's discretion will be guided and its consideration deliberate.

The United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed. In Proffitt v. Florida, the Court upheld a statute that did not require this standard when the jury rendered an advisory verdict on whether the death penalty should be imposed. See

Proffitt v. Florida, 428 U.S. at 257-58 (plurality opinion). Although the jury's verdict in this statute is mandatory, we do not think that this difference makes this statute distinguishable from the one in Proffitt. Moreover, we are not aware of any instance where the state must carry such a burden of proof when attempting to convince a sentencing authority of the appropriate criminal sentence. If the Supreme Court had intended for the burden in death-penalty cases to vary from the standard burden in all other criminal sentencing, it would have said so in one of the many modern cases dealing with the death penalty.

C. Written Findings

Harris also argues that the statute violates the eighth and fourteenth amendments because it does not require the jury to make written findings

delineating the basis for its decision to impose the death penalty. The California Supreme Court has rejected this contention and held that the requirement that the judge make written findings upholding or overturning the jury's verdict is sufficient to satisfy the procedures validated in Gregg v. Georgia and Proffitt v. Florida. See People v. Jackson, 28 Cal.3d at 316-17; People v. Frierson, 25 Cal.3d at 178-80 (plurality opinion).

We agree with the California Supreme Court's conclusion because the California statute is very similar to the statute upheld in Proffitt v. Florida, 428 U.S. 242, 250 (1976). There the judge, not the jury, set forth written findings stating the reasons why the death sentence was appropriate under the Florida statute. Under that statute, the jury's

verdict was only advisory. Id. at 249.

Although the jury's verdict here is mandatory, the judge

shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

Cal. Penal Code § 190.4(e). Because the judge must determine independently whether the death penalty is appropriate and, in so doing, weigh the evidence of aggravating and mitigating circumstances, the appellate court is provided with a sufficient record upon review. On the basis of the judge's written conclusions, the appellate court can determine whether the evidence supported the jury's finding of aggravated circumstances. If the

judge and the appellate court conclude that the jury verdict is supported by the evidence, the danger that the jury acted under the influence of undue passion or prejudice is negligible. See Gregg v. Georgia, 428 U.S. at 195 (plurality opinion). While it might be preferable to have the sentencer provide a written statement concerning the basis for the decision to impose the death penalty, we cannot say that the California statute is unconstitutional because it requires only the judge to provide such a statement. The judge's statement provides an adequate basis for appellate review.

D. Proportionality Review

Harris' final argument under the eighth and fourteenth amendments is that the California Supreme Court's failure to conduct a proportionality review in this case renders his death



penalty sentence unconstitutional. A plurality of the United States Supreme Court has approved proportionality review whether such is provided by state, see Gregg v. Georgia, 428 U.S. at 167, 203, or by state law, see Proffitt v. Florida, 428 U.S. at 259. The Supreme Court has discussed proportionality concerning the death penalty in at least two ways. First, in several instances the Court has examined whether the death penalty was proportionate to the crime for which it was imposed. See, e.g., Coker v. Georgia, 433 U.S. 584, 591-92 (1977) sentence of death grossly disproportionate to crime of rape when no life taken (plurality opinion); Gregg v. Georgia, 428 U.S. at 187 & n.35 (declining to address whether death penalty disproportionate for crimes such as kidnapping or armed robbery but noting that death

penalty not invariably disproportionate to murder) (plurality opinion). Second, the Court has examined whether the penalty in the case was proportionate to other sentences imposed for similar crimes. See Gregg v. Georgia, 428 U.S. at 198, 203 (plurality opinion); id. at 211-12, 223-24 (White, J., concurring) This latter proportionality review, intended to prevent the arbitrary and capricious application of the penalty, id. at 203, is what concerns us here.

In response to these cases, a plurality of the California Supreme Court in People v. Frierson stated that it would review each death penalty under the challenged statute to determine whether the penalty was being applied proportionately. 25 Cal.3d at 183. A majority of the Court later stated that the Court was "fully prepared to afford whatever

kind of proportionality review" is constitutionally mandated by the Supreme Court. People v. Jackson, 28 Cal.3d at 317. The California court, however, did not undertake any proportionality review in this case. People v. Harris, 28 Cal.3d at 964. Rather, the court stated that it refused to consider the petitioner's arguments concerning the constitutionality of the death penalty because it had already done so in People v. Frierson. It gave no indication that any type of proportionality review, as required under Gregg v. Georgia and Proffitt v. Florida was undertaken.<sup>2/</sup> Id.

Therefore, we must vacate the district court's denial of Harris' petition and instruct the court to remand the case to the California Supreme Court to determine whether the penalty in this

case is proportionate to other sentences imposed for similar crimes. It must be recognized, however, that given the broad range of considerations relevant in determining whether to impose the death penalty, any statistical showing based on a particular selection of "similar" cases may not be conclusive of the usual practice. As the Supreme Court has explained, Furman did "not require that all sentencing discretion be eliminated, but only that it be 'directed and limited,' so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many in which it is not.'" Lockett v. Ohio, 438 U.S. 586, 601 (1978), citing Gregg v. Georgia, 428 U.S. at 188-89. [T]he isolated decision

of a jury to afford mercy" in a particular case does not make death sentences imposed on other defendants unconstitutional as long as the sentencing system does not create a substantial risk of arbitrariness and caprice. Gregg v. Georgia, 428 U.S. at 203 (plurality opinion.)

II. Discriminatory Application of the Death Penalty

Harris contends that he is entitled to an evidentiary hearing on his claims that the California death-penalty statute violates the equal protection clause of the fourteenth amendment because it is applied: (1) discriminatorily against defendants convicted of murdering whites, as opposed to persons of other races and ethnic groups; (2) discriminatorily against males; and (3) discriminatorily on the basis of the age

and socio-economic status of the offender. Harris argues that because the state did not provide him an evidentiary hearing on his claims, he is entitled to a hearing in federal court.

Where the facts underlying a constitutional claim are in dispute, a federal court in habeas corpus must hold an evidentiary hearing if the habeas petitioner did not receive a full and fair evidentiary hearing in a state court. Townsend v. Sain, 372 U.S. 293, 312 (1963); Briggs v. Raines, 652 F.2d 862, 866 (9th Cir. 1981). See 28 U.S.C. § 2254(d)(6). To be entitled to the hearing, a habeas petitioner must show that (1) he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations. Pierce v. Cardwell, 572

F.2d 1339, 1340-41 (9th Cir. 1979). We do not believe that the State accorded Harris a full and fair hearing on these constitutional claims. Although we do not decide whether Harris has a right to a hearing in federal court under Pierce, we believe that the district court should, if it becomes necessary, provide an opportunity to develop the factual basis and arguments concerning the race-discrimination and gender-discrimination claims.

A. Race Discrimination

Harris contends that the California death-penalty statute is administered in an intentionally discriminatory fashion against defendants convicted of killing white persons, as opposed to victims of other races or ethnic backgrounds. In support of his contention, Harris

submitted affidavits showing that, in 1980, 67 percent of the persons receiving a death sentence in robbery-murder circumstances had murdered white victims, while only 4 percent had murdered black victims, and 29 percent had murdered victims of other minority groups.

Whether the statistical discrepancy is caused by a qualitative difference in the murders is a question that can be resolved only at a hearing. Harris concedes that factors other than the race of the victim may influence the statistics, but there has been no opportunity to explore the extent of their significance.

It is unclear whether discrimination can be inferred from such statistical showings. Long-continuing and marked statistical disparities between races, however, may indicate a sufficient pattern to shift the burden to the



state to furnish a constitutionally-acceptable explanation for such disparities. In the absence of at least some indication that the disproportionate impact can be explained on nonracial grounds, Harris would seem to be entitled to an evidentiary hearing on his contention if such becomes necessary.

The allegation of discriminatory application of the death penalty under the cruel-and-unusual-punishment clause resembles in all essential respects the contention that the death sentence is imposed in an arbitrary and capricious fashion. See Spinkellink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978).<sup>3/</sup> Because we have previously discussed this allegation, we need not discuss it again here. Instead, we focus on Harris' contention that the death-penalty statute, although facially

neutral, is being administered intentionally in a discriminatory manner in violation of equal protection.

In Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Supreme Court made clear that, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that effect can be traced to a discriminatory purpose. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979). The disproportionate effect of official action is not, however, irrelevant to a claim of racial discrimination. Washington v. Davis, 426 U.S. at 241. In fact, it often provides an important starting point in

the inquiry. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266. Furthermore, there may be cases in which effect alone can unmask an invidious classification. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 275.

It is not necessary, however, for us now to decide whether this is such a case. Both sides have not had an opportunity to present evidence and, therefore, Harris could not prove the discriminatory intent or purpose required by Washington v. Davis and Arlington Heights. Although we do not decide that Harris has stated a claim for relief, we think that if it becomes necessary the district court should provide the parties with the opportunity to develop the evidence and

arguments essential to an adequate review of this claim.<sup>4/</sup>

B. Gender Discrimination

Harris also contends that the California death-penalty statute is intentionally applied in a discriminatory fashion against males. He submitted affidavits showing that, in California between 1978-80, 1,164 persons were convicted of murder in the first or second degree, of which only 64, or 5.5 percent, were females. Of the 98 persons sentenced to death during this period, none were female. Harris' expert witness concluded that the total exclusion of women from the pool of those defendants receiving the death sentence is indicative of gender influencing the process. The expert admitted, however, that "before any conclusions can be drawn about the

actual existence of discrimination based on gender . . . further analysis [is required] to determine whether the influence of other factors than gender can account for the disparities observed here."

The Supreme Court has noted that the principles of Washington v. Davis and Arlington Heights apply with equal force to a claim involving alleged gender discrimination. Personnel Administration of Massachusetts v. Feeney, 442 U.S. at 274. Although we do not decide that the total exclusion of women from persons receiving the death sentence would be a violation of equal protection, we think that if it becomes necessary the district court should provide Harris and the State with the opportunity to present evidence

and arguments essential to an adequate review of this claim.

C. Wealth and Age Discrimination

Harris also contends that the death penalty is being intentionally applied discriminatorily on the basis of the defendant's age and socio-economic status. Harris, however, has made no showing in support of this claim. He argues that the state has the information necessary to present this claim, but has refused to disclose it.

Harris' conclusory allegations do not provide a sufficient basis to obtain a hearing in federal court. We decline his invitation to hold that he has a right to an evidentiary hearing absent some stronger showing.

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### III. Pretrial Publicity

Pervasive media coverage of Harris and his crimes started with his televised capture for bank robbery. The pretrial publicity apparently included stories that Harris and his brother had confessed to the crimes, that Harris had previously been convicted of manslaughter and that Harris had violated his parole. Numerous editorials and letters to the editor called for the death penalty and a television poll overwhelmingly showed that viewers supported the death penalty in this case. Even the battle between the U.S. Attorney's and District Attorney's offices concerning who would have the first opportunity to prosecute Harris received extensive coverage by the local media for over

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two weeks. See People v. Harris, 28 Cal. 3d at 965-69 (Bird, C.J., dissenting).

Asserting that the extensive publicity had made a fair trial impossible, Harris made a pretrial motion for a change of venue. The trial court denied the motion. The California Supreme Court upheld the denial because it believed that the size of the community dissipated the effect of the pretrial publicity and that the voir dire testimony of the jurors demonstrated no prejudicial effect from the publicity. Id. at 949-50.

The district court agreed with the California Supreme Court's conclusion that the pretrial publicity did not require a change of venue. In reaching that decision, the district



court failed to request and examine any of the articles or broadcasts or the voir dire transcript.

This court has consistently required a district court, when considering a petition for a writ of habeas corpus, to "make its determination as to the sufficiency of the state court findings from an independent review of the record, or otherwise grant a hearing and make its own finding on the merits." Turner v. Chavez, 586 F.2d 111, 112 (9th Cir. 1978). See e.g. Pierre v. Thompson, 666 F.2d 424, 427 (9th Cir. 1982); Patterson v. Warden, 624 F.2d 69, 70 (9th Cir. 1980); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980); Griff v. Rhay, 455 F.2d 494, 495 (9th Cir. 1972). Unless it is shown that the district court examined all relevant parts of the state court record, this court

cannot affirm a district court's judgment dismissing a habeas corpus petition. Rhinehart v. Gunn, 598 F.2d 557, 558 (9th Cir. 1979).

Where prejudicial pretrial publicity is alleged, the relevant parts of the state court record include, at a minimum, copies of the newspaper articles and, if available, any transcripts of television and radio broadcasts. Because a federal court sitting in habeas has a duty "to independently evaluate the voir dire testimony of the impaneled jurors," Irvin v. Dowd, 366 U.S. 717, 723 (1961), the entire transcript of the voir dire testimony should also be examined. It is only after examination of such relevant parts of the record that the district court can determine that the

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state court findings are supported by the record.

The Supreme Court's decision in Sumner v. Mata, 449 U.S. 539 (1982), has not altered the district court's duty under Irvin and Rhinehart to examine relevant parts of the state court record, particularly the voir dire transcript. Sumner requires a federal court in a habeas proceeding generally to accord a statutory presumption of correctness of state court findings, but such a presumption is not required if the federal court concludes that findings are not fairly supported by the record. Sumner v. Morton, 449 U.S. at 550; see 28 U.S.C. § 2254(d)(8).

On remand, the district court should, if necessary, request and examine all relevant parts of the state court record to determine whether the

record supports the state court's findings. To the extent that findings made by the California Supreme Court, such as the makeup of the jury impaneled to hear the case, are supported by the record, the district court, pursuant to Sumner, must presume the correctness of such findings. We note, however, that the majority of the California Supreme Court made no findings on the issues usually considered by a federal court in deciding whether a defendant has been accorded a fair trial under federal standards, such as the number of jurors interviewed at voir dire, the number excused for cause or peremptorily challenged, or the number who admitted to having preconceived notions regarding Harris' guilt. All of these factors have been considered by federal courts in deciding whether a

change of venue should have been granted. See, e.g., Dobbert v. Florida, 432 U.S. 282, 302-03 (1977); Murphy v. Florida, 421 U.S. 794, 796 (1975); Sheppard v. Maxwell, 384 U.S. 333, 345 (1966); Narten v. Eyman, 460 F.2d 184, 187-88 (9th Cir. 1969).

IV. Fifth Amendment Issues

Dr. Wait Griswold, a psychiatrist, interviewed Harris at the police station after his arrest and confession. Harris was given standard Miranda warnings, see Miranda v. Arizona, 384 U.S. 436 (1966), and agreed to speak with Dr. Griswold. Harris' statements to Dr. Griswold were used against Harris at the penalty phase of his bifurcated trial to rebut his testimony that he felt remorse for the killings.

Harris contends that the Miranda warnings were inadequate because

the interrogation was conducted by a psychiatrist. He also argues that his statements were involuntary and made without an intelligent waiver of counsel because he was not aware of the capital nature of his crimes and was not specifically advised that his statements could be used at the penalty phase of his trial by the prosecution in seeking the death penalty.

Harris' argument relies heavily on the recent Supreme Court decision of Estelle v. Smith, 451 U.S. 454 (1981). In Estelle, the defendant had been indicted for murder and the court had already appointed counsel. The State of Texas had announced its intention to seek the death penalty. The court then ordered a psychiatric examination to determine the defendant's competency to stand trial. Thereafter, the

defendant was tried by jury and convicted. At the separate sentencing proceedings, the psychiatrist testified as to the defendant's future dangerousness, an element required under Texas law before the death penalty may be imposed, based on the psychiatrist's pretrial examination of the defendant. Id. at 456-58.

The Court ruled that Estelle's fifth and sixth amendment rights had both been violated. His fifth amendment right was violated because he had not been advised of his Miranda rights before the pretrial examination. His sixth amendment right was violated because he had already been indicted, and his court-appointed attorney was not notified in advance that the psychiatric examination would encompass the issue of his client's future dangerousness. The defendant therefore

had been "denied the assistance of his attorneys in making the significant decision whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. at 471.

Estelle differs from the present case in at least two significant respects. First, Estelle involved a post-arraignment, court-ordered psychiatric evaluation to determine the defendant's competency to stand trial. In the present case, Harris had not yet requested or retained counsel, nor had he been arraigned or indicted. Thus, sixth amendment concerns implicated in Estelle are not present here. Second, the defendant in Estelle did not receive any Miranda warnings, while there is no dispute that Harris received several Miranda warnings. Because of these



differences, Estelle, although instructive, does not control the disposition of Harris' appeal.

A. Adequacy of Miranda Warnings

Harris argues that the standard Miranda warnings were inadequate because he was not specifically informed that the prosecution could use his statements in seeking the death penalty at the penalty phase of his trial. Although Estelle contains some language that arguably can be construed to support that position, we read Estelle to require that only standard Miranda warnings need be given in this situation.

In Estelle, the Court stated that:

A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital

sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the state could not rely on what he said to [the psychiatrist] to establish his future dangerousness.

Id. at 468. This passage shows that the Court did not hold that a defendant must be specifically advised that his statement may be used against him at a capital sentencing proceeding. As noted earlier, Estelle addressed a situation where no Miranda warnings had been given. The specific reference to a "capital sentencing proceeding" does not mandate that a more specific warning be given; it merely amplifies the Court's earlier rejection of the State's contention that fifth amendment concerns were not even implicated in the use of the defendant's testimony at the penalty

phase, as opposed to the guilt phase of the trial. Id. at 462-63. In addition, the reference to informing a defendant of his "right to remain silent and the possible use of his statements," reasonably construed, requires only the standard Miranda warnings, not a special caveat concerning the use of his statements at the penalty phase of a capital proceeding. Here, Harris was advised that anything he said could and would be used against him in a court of law. Estelle does not require anything more elaborate.

Harris also argues that more explicit warnings regarding the use of statements at a capital sentencing proceeding should be required even if Estelle does not mandate such a holding. His only support for this proposition is that such a warning would comport

with certain psychiatric association ethical codes. This argument attempts to confer "Super-Miranda" rights upon suspects whom police psychiatrists seek to interview. We decline to extend Miranda in such a manner and hold that Harris was entitled only to standard Miranda warnings, which he received.

B. Voluntariness of Harris' Statements

Again relying on language in Estelle,<sup>5/</sup> Harris contends that his statements to the psychiatrist were not voluntary and, because he was not given the more detailed warnings, his waiver of the right to counsel was not knowing and intelligent. Harris also argues that, under the circumstances, he was unconstitutionally misled into thinking that the psychiatrist was there to help him.

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We find these contentions to be without merit. Harris' waiver of his right to counsel and the voluntariness of his subsequent statements are judged under fifth amendment standards. See Edwards v. Arizona, 451 U.S. 477, 482 (1981). Because Harris' psychiatric interview occurred before arraignment and indictment, no sixth amendment right to counsel was involved. See Moore v. Illinois, 434 U.S. 220, 226-29 (1977). Any reliance on Estelle is, therefore, misplaced. The Estelle Court emphasized that its holding was directed at the specific type of psychiatric investigation at issue there, a court-ordered examination "conducted [ostensibly to determine competency to stand trial] after adversary proceedings have been instituted." Estelle v. Smith, 451 U.S.

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at 470 n.14 (emphasis added). The Court explained that it was not

concerned . . . with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in Miranda v. Arizona . . . . Rather, the issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination.

Id. at 470 n.14. Thus, in Estelle the Court was concerned with situations where counsel had already been appointed or otherwise obtained, the defendant had evidenced a desire to retain counsel, or the defendant had indicated that he wished to remain silent. None of those circumstances were present here. Harris' sixth amendment right to counsel had not yet attached and he had waived his fifth amendment right to counsel.

Finally, Harris' bare allegation that he was somehow misled into thinking that the psychiatrist was there to treat him or help him is insufficient to raise a factual issue. The evidence overwhelmingly indicates that he knowingly and intelligently waived his fifth amendment rights and gave his statements to Dr. Griswold voluntarily.

C. Subsidiary Issues Concerning  
Psychiatric Testimony

Harris claims that Dr. Griswold lied about having been hired to testify in the past about as often by prosecution attorneys as by defense attorneys. This claim, however, raises no constitutional issue. Rather, this is purely a state-law evidentiary issue not cognizable in a petition for habeas corpus. See 28 U.S.C. § 2254(a) (court may entertain habeas application only on

ground that custody violates the constitution or laws or treaties of United States).

Harris also contends that the surprise nature of Dr. Griswold's testimony violated due process. We find this argument to be without merit. In professing remorse, Harris could have well expected rebuttal testimony. He concedes that to the extent the psychiatrist's testimony served as rebuttal to Harris' expression of remorse, no advance notice that the psychiatrist would testify was required. Harris argues, however, that the prosecutor used the testimony to do far more than rebut Harris' alleged remorse. The California Supreme Court concluded, however, that Dr. Griswold's testimony was properly characterized and utilized as rebuttal testimony. See People v.



Harris, 28 Cal. 3d at 961-62. No federal ground is presented to dispute that characterization on this appeal.

V. Special Circumstances

Under § 190.2 of the California Penal Code, the penalty for a defendant found guilty of first degree murder is death or confinement for life without possibility of parole when certain special circumstances are charged and specially found to be true. Cal. Penal Code § 190.2. The State charged Harris with three special circumstances for each murder: (1) multiple murders (§ 190.2(c)(5)); (2) murder during a robbery (§ 190.2(c)(3)(i)); and (3) murder during a kidnapping (§ 190.2(c)(3)(ii) and then asked for a single death penalty. Thus, Harris was charged with six special circumstances, all of which the jury unanimously found

to be true beyond a reasonable doubt.

Harris argues that charging him twice with the special circumstances artificially inflated the aggravating factors considered by the jury in determining Harris' penalty. According to Harris, reversal is required because it is impossible to determine from the record the resulting degree of prejudice to him.

We conclude that the jury could not have been misled in this case by the duplicative charging of special circumstances. It was clear throughout the trial that two murders, not four, were committed and that both murders arose out of one incident. It is highly unlikely that the jury simply counted up the special circumstances charged and based its verdict on such calculation.

We cannot reverse on the basis of speculation of that nature.

VI.        'Exclusion of Testimony at  
Sentencing Trial

Harris contends that the court erred in refusing to admit the testimonies of a former warden of San Quentin and of a television correspondent. His avowed purpose was to provide the jury with an understanding of some of the differences between life imprisonment and a death sentence, to explain how the death penalty is carried out, and to vividly portray to the jury the last few moments of a person who has been sentenced to death in the gas chamber. Harris argues that evidence of the nature of the possible sentence is relevant and crucial to whether the death sentence is appropriate.

In Gregg v. Georgia, a plurality of the Supreme Court, commented that:

[s]o long as the evidence introduced and arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

428 U.S. at 203-04. We read this language as referring to the trier's need, at the sentencing stage, for information on the defendant's character, the nature of the crime, and past acts -- information which may be too prejudicial for consideration at the guilt phase -- and not for information on the nature of the proposed penalty.

Our reading is consistent with the plurality opinion in Lockett

v. Ohio, which states that

the Eighth and Fourteenth Amendments require the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis in original) (footnotes omitted). There, the plurality specifically added that nothing in the opinion limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense. Id. at 604 n.12. We conclude, therefore, that the trial court did not err in refusing to admit the proffered testimony explaining how the death penalty is carried out. Such

evidence did not bear on the defendant's character, prior record, or the circumstances of the offense.

VII. Conclusion

Because the California Supreme Court did not undertake the proportionality review it established in People v. Frierson, 25 Cal. 3d at 183, and in People v. Jackson, 28 Cal. 3d at 317, we vacate the district court's denial of the petition for a writ of habeas corpus. The district court is instructed to remand the case to the California Supreme Court for the purpose of a proportionality review and to take whatever other actions that are subsequently necessary and consistent with this opinion.

VACATED and REMANDED.

FOOTNOTES

1. [reference on page 2 (3)]

At the November 7, 1978 General Election, California voters adopted an initiative measure (Proposition 7) which broadened the application of the death penalty provisions. See People v. Frierson, 25 Cal. 3d 142, 152 (1979). We are concerned here solely with the 1977 legislation.

2. [reference on page 9 (21)]

Because we decide that the state court erred in not conducting a proportionality review of Harris' case to determine whether the imposition of the death penalty was arbitrary or capricious, it is unnecessary to decide Harris' claim that the court committed a distinct violation of due process by not providing an opportunity for such a hearing when the defendant specifically raised the claim. Harris also complains of prosecutorial arbitrariness in charging practices in San Diego County. Harris has not made a sufficient showing to support his claim. "[I]t cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." Gregg v. Georgia, 428 U.S. at 225 (1976) (White, J., concurring).

3. [reference on page 12 (27)]

Although we do not decide whether Harris has stated a claim for relief, we note that in Spinkellink v. Wainright, 578 F.2d 582 (5th Cir. 1978),

cert. denied, 440 U.S. 976 (1979), the Fifth Circuit held that the petitioner, who raised claims similar to those Harris makes here, was not entitled to an evidentiary hearing because, even assuming that the factual allegations were true, he was not entitled to relief as a matter of law. The Fifth Circuit ruled that if a state follows a properly-drawn statute in imposing the death penalty, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed, and a closer comparison of the defendant's case with other death-penalty cases is unnecessary. Id. at 604.

4. [reference on page 13 (30)]

The Supreme Court has long been concerned with racial discrimination in the imposition of the death penalty. See Furman v. Georgia, 408 U.S. 238, 250-51, 256-57 (Douglas, J., concurring); id. at 365-66 (Marshall, J., concurring); id. at 309-10 (Stewart, J., concurring). Recently, in Godfrey v. Georgia, 446 U.S. 420 (1980), Justice Marshall noted that "[t]he disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences." Id. at 439 (Marshall, J., concurring), citing NAACP Legal Defense and Educational Fund, Death Row, USA, 1 (April 20, 1980).

5. [reference on page 19 (46)]

In Estelle, the Supreme Court noted that:



Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in the subject matter." As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel."

451 U.S. at 471 (citations omitted).

Harris argues that this shows that no knowing and intelligent waiver of counsel can be made where the prosecution seeks an ex parte psychiatric interview with a suspect facing possible capital punishment. The above quotation, however, was a discussion of the importance of having Smith's already-appointed counsel available to help him

make the decision; it was not intended to cover all circumstances where a psychiatrist might be involved.

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Robert Alton Harris v. R. Pulley,  
Warden of the California State Prison  
at San Quentin; No. 82-5246

CANBY, Circuit Judge, concurring:

I concur in the judgment and in all of the court's opinion except Section I.C, which holds the California statute constitutional despite the absence of a requirement of a written statement by the jury of the reasons for its imposition of the death penalty. On that point, I respectfully disagree.

The purpose of requiring a sentencing jury to provide written findings in support of a death sentence is to enable appellate courts to ensure that the jury's discretion was properly exercised and that the sentence was not arbitrary or capricious. Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion). In the absence of

such written findings, the reviewing court can only assume that the jury acted within its instructions. While that assumption is commonly employed in reviewing general verdicts of guilt, it is not a permissible basis for approval of a death sentence.

In Roberts v. Louisiana, 428 U.S. 325 (1976), the Supreme Court struck down a statutory scheme under which five specific types of murder carried a mandatory death sentence. The statute also required that the jury in each such case be instructed on lesser included offenses of second-degree murder and manslaughter, whether or not the evidence justified those instructions. The state argued that the specificity of categories of capital murders was sufficient to guide the jury and avoid the danger of

capriciousness that had led the Supreme Court to strike down other death penalty statutes. The plurality rejected the state's argument and commented as follows:

This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion.

Id. at 334-35. This language indicates that some method must be provided to determine whether the sentencing jury followed instructions and whether its

death sentence was arbitrarily imposed. While California has provided a system that furnishes standards to guide the jury initially, it has not required from the jury any documentation to permit the requisite review of the jury's death sentence.

The majority relies, as did the California Supreme Court, on the fact that the trial judge is required by the California statute to review the jury's sentence and to make written findings in support of his or her determination to uphold or set aside the jury's sentence. The majority finds this system sufficiently close to that approved in Proffitt v. Florida, 428 U.S. 242 (1976), to render it constitutional. In Proffitt, however, the statute imposed upon the judge, not the jury, the final decision whether or not

to pass the death sentence. The judge was required to set forth his or her reasoning in written form, which permitted the necessary appellate review. In the present case, the California statute places the judge in an entirely different position. The death sentence itself is imposed by the jury. That sentence will stand unless the judge finds it contrary to law or not supported by the evidence. The judge's reasons for approving the jury's sentence need not be the reasons that the jury, the actual sentencing authority, relied upon in imposing the death sentence. Review of the judge's findings is therefore not an adequate substitute for an effective review of the jury's determination to impose the death sentence. Because the California statute fails to require written

findings by the jury that would permit review to determine whether the death sentence was arbitrarily imposed, it violates the eighth and fourteenth Amendments.



APPENDIX B

[Filed November 15, 1982]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 82-5246

D.C. No. CV 82-0249-WBE

ORDER

ROBERT ALTON HARRIS,	)
	)
Petitioner,	)
	)
v.	)
	)
R. PULLEY, Warden of the	)
California State Prison	)
at San Quentin,	)
	)
Respondent.	)
	)

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Before: CHOY, ANDERSON and CANBY,  
Circuit Judges

The opinion filed September 16,  
1982 is hereby amended as follows:

The second sentence in the first  
paragraph in the slip opinion at 4377 is  
modified to read:

Because the California Supreme Court did not undertake a proportionality review of the application of the death penalty in this case, we vacate the district court's denial of the petition and instruct the district court to grant the petition relieving petitioner from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days from the date this order is filed, the proportionality review announced in People v. Frierson, 25 Cal. 3d 142, 183 (1979) (plurality opinion), and People v. Jackson, 28 Cal. 3d 264, 312 (1981). . . .

The first paragraph following Roman numeral I on page 4377-78 of the slip opinion is amended to read:

California has established by statute an elaborate procedural mechanism for the imposition of the death penalty. If a jury convicted the defendant of first degree murder, the same jury must also generally determine whether the special circumstances are true, Cal. Penal Code § 190.4 (Deering 1977),<sup>1</sup> and, if necessary, the penalty. Id. § 190.3. Even if the trial judge acted as the fact finder, a jury just determine the special circumstances unless the defendant and the people waive this right. Id. at § 190.4. Once the defendant has been found guilty of first degree murder, the procedure

is divided into the special-circumstances stage and the sentencing stage. See People v. Superior Court, 31 Cal. 3d 797, 803 (1982). First, the jury must determine the truth of any special circumstances the prosecution has charged. Cal. Penal Code § 190.1(b). The jury cannot impose the death penalty unless it first finds at least one statutorily specified special circumstance to be true beyond a reasonable doubt. Id. If it finds the special circumstance true, the jury must then move to the sentencing stage: reviewing the mitigating and aggravating circumstances to determine whether the death penalty should be imposed. Id. § 190.3. . . .

On page 4380, the first paragraph following part "B. Burden of Proof" and the first sentence of the second paragraph is amended to read:

B. Burden of Proof

Harris contends that the statute's failure to specify the state's burden of proof in the sentencing stage -- determining whether the aggravating factors outweigh the mitigating ones -- violates due process because it results in jury capriciousness. He argues that the state must prove beyond a reasonable doubt that the death penalty is appropriate. These contentions are without merit.

Although the statute does not specify the burden of proof at this stage, it does require use of the beyond-a-reasonable-doubt standard in the stage where the truth of any special circumstance is determined.

. . .

On page 4382, the first sentence of the second paragraph is modified to read:

Therefore, we must vacate the district court's denial of the petition and instruct the district court to grant the petition relieving petitioner from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days from the date this order is filed, the determination of whether the penalty in this case is proportionate to other sentences imposed for similar crimes. . . .

The following paragraph should be added to the end of footnote 3 appearing on pages 4383-84:

We also note that the Eleventh Circuit, which adopted as precedent the decisions of the former Fifth Circuit, see *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), has read *Godfrey v. Georgia*, 446 U.S. 20 (1980), as

implicitly disapproving part of the language in Spinkellink. See Proffitt v. Wainright, 685 F.2d 1227, 1261-62 n. '11th Cir. 1982) (concluding that Spinkellink's language precluding federal courts from reviewing state court application of capital sentencing criteria no longer valid). We need not decide here, however, the effect of Spinkellink on Harris' claims or of Godfrey on the Spinkellink decision.

On page 4391, the paragraph in part "VII. Conclusion" is modified to read:

Because the California Supreme Court did not undertake the proportionality review it announced in People v. Frierson, 25 Cal. 3d at 183, and in People v. Jackson, 28 Cal. 3d at 317, we vacate the district court's denial of the petition and instruct the district court to grant the petition relieving petitioner from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days from the date that this order is filed, the proportionality review. We also instruct the district court to take whatever other actions that are subsequently necessary and consistent with this opinion.

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VACATED AND REMANDED.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

[Filed March 22, 1982]

[Entered March 23, 1982]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 82-0249-E

ORDER

ROBERT ALTON HARRIS,	)
	)
Petitioner,	)
	)
v.	)
	)
R. PULLEY, Warden of the	)
California State Prison at	)
San Quentin, California,	)
	)
Respondent.	)
<hr/>	

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at the hearing on March 12, 1982, and based upon the findings made and for the reasons expressed in open court, the court hereby

- 1) Denies petitioner's application for writ of habeas

corpus pursuant to 28 U.S.C.  
§ 2254 and dismisses his  
petition;

- 2) Denies petitioner's request  
for stay of execution;
- 3) Denies petitioner's request  
for additional hearings.

Petitioner's request for issuance of a  
certificate of probable cause is granted.

IT IS SO ORDERED.

DATED: March 22, 1982

/s/  
WILLIAM B. ENRIGHT, Judge  
United States District Court



APPENDIX D

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

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- A-77 -

CALIFORNIA CONSTITUTION

ARTICLE I

SECTION SEVENTEEN

Cruel or unusual punishment  
may not be inflicted or excessive fines  
imposed.

82-1095

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SUPREME COURT  
FILED

FEB 11 1981

LAURENCE P. GILL, Clerk

Deputy

PEOPLE v. HARRIS

Crim. 20888

FOR APPELLANT:

Michael J. McCabe  
Savitz & McCabe  
108 Ivy Street  
San Diego, CA 92101  
(714) 231-1181

FOR RESPONDENT:

Michael Wellington  
Deputy Attorney General  
Office of Attorney General  
110 West A Street  
San Diego, CA 92101  
(714) 236-7351

DOCKET	
CR. NO.	79 DA0187
Entered by	JE
Date Filed	2-11
Date Rec'd	2-12/81

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	Crim. 20868
	)	
ROBERT ALTON HARRIS,	)	Super. Ct. No. 44135
	)	
Defendant and Appellant.	)	
	)	
	)	

---

Defendant Robert Alton Harris appeals from a judgment imposing the death penalty following his conviction of kidnaping, robbery and first degree murder of John Mayeski and Michael Baker. (Pen. Code, §§ 187, 189, 190, 209, subd. (b), 211.)<sup>1/</sup> Defendant was also convicted of receiving stolen property (§ 496, subd. 1) and of possession of a concealable firearm by an ex-felon (§ 12021). The latter offense and the allegation that he had served a prior separate prison term for manslaughter, a "violent felony" within the meaning of section 667.5, subdivision (c), were admitted by defendant outside the presence of the jury. With regard to each of the kidnaping, robbery and murder

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<sup>1/</sup> Statutory references are to sections of the Penal Code unless otherwise noted.

counts, the jury found defendant was armed with a firearm (§ 12022), personally used a firearm (§§ 1203.06, 12022.5) and personally inflicted great bodily injury upon his victims (§ 12022.7). That defendant was convicted in this proceeding of more than one first degree murder was one of the special circumstances found by the jury. (§ 190.2, subd. (c)(5).) The other special circumstances were that each of the murders was willful, deliberate, premeditated and committed during the commission of kidnaping and robbery. (§ 190.2, subd. (c)(3)(i)-(iii).) We affirm the judgment.

#### GUILT PHASE

In May or June of 1978 defendant first asked his brother Daniel for help in a planned bank robbery.<sup>2/</sup> Defendant next raised the subject in July of 1978 while visiting Daniel in Visalia. On 2 July 1978, Daniel stole a .22 rifle and a .9 millimeter pistol from the home of Jim Corbin, a neighbor. While Daniel and defendant were in the house, apparently in Corbin's absence, defendant stated they needed weapons for the bank robbery and asked whether there were any in the house. Daniel then showed defendant the guns and took them from the house.

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<sup>2/</sup> Daniel testified for the People in return for being permitted to plead guilty to one count of kidnaping. His testimony was corroborated by a series of extrajudicial statements made by defendant.

The brothers left Visalia for San Diego that evening. The next morning, 3 July 1978, they purchased ammunition, went to a nearby rural area and practiced firing the weapons by shooting at trees while running and rolling--a drill they considered appropriate in preparing for the bank robbery. The brothers then drove to the Mira Mesa area of San Diego County and spent the night in a house defendant had been sharing with his girl friend.

The following morning, 4 July 1978, defendant and his brother purchased more ammunition as well as knit caps, in which they burned eye holes, to serve as masks in the bank robbery. That afternoon they went to the Miramar Lake area, near Mira Mesa, for more shooting practice. They walked up a fire trail, fired a few rounds, but left when a vehicle approached. They next reconnoitered the area around their intended target--the San Diego Trust and Savings Bank on Mira Mesa Boulevard.

The next morning, 5 July 1978, having decided to steal an automobile for use as a getaway car, the brothers spotted a green Ford in a grocery store parking lot directly across Mira Mesa Boulevard from the bank. John Mayeski, 15, and Michael Baker, 16, were in the car eating hamburgers. Assuring Daniel "nobody is going to get hurt," defendant walked over to the Ford, pulled the pistol from his waistband,

and got in the back seat. With Daniel following in defendant's car, the Ford was then driven out Mira Mesa Boulevard toward Miramar Lake and the fire trail where the brothers had been the day before.

At the foot of the fire trail defendant and Daniel parked the cars and forced the two boys to walk up the trail at gunpoint. Defendant was carrying the pistol and Daniel the rifle. Defendant told the boys their car was going to be used in a bank robbery but that no one would be hurt. Defendant asked the boys whether there was any rope in their car. The boys replied there was not but said they would walk to the top of the hill, wait until the brothers drove back to Mira Mesa, and then report the Ford as stolen, giving the police a misleading description of the thieves. Defendant voiced approval of this suggestion.

The boys then began walking up the hill. Suddenly, Daniel heard a shot. Turning around, he saw John Mayeski fall to the ground. Defendant had shot the boy in the back with the pistol. Defendant fired another shot into the boy's head, then ran after Michael Baker. Finding the Baker boy crouching and screaming in the brush, defendant shot him four times. Defendant then went back to the fallen Mayeski boy and fired a shot point-blank into his head. Finally, defendant picked up the rifle dropped by



Daniel and shot John Mayeski yet again. The brothers then left the murder scene and drove back to the house defendant shared in Mira Mesa. There defendant ate the remainder of the dead boys' food and laughed at Daniel for not having the stomach to join him.

While the brothers continued preparing for the bank robbery, defendant laughed and giggled about shooting the boys, saying he had blown Michael Baker's arm off. Defendant also amused himself by imagining what it would be like to be a police officer and to report the boys' deaths to their families. When Daniel noted there were fragments of flesh on defendant's pistol, apparently from the point-blank shot fired into John Mayeski's head, defendant laughed, commented he had really blown the boy's brains out, and then flicked the bits of flesh into the street.

Later the same day the brothers robbed the bank.<sup>3/</sup> They were quickly arrested for the bank robbery when a witness, who followed them from the bank to defendant's house, called the police.

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<sup>3/</sup> They were convicted of this crime in a federal proceeding.

The brothers were arrested at 1:05 p.m. on 5 July 1978. At 4 p.m., Daniel first informed officers of the murders; at 6:30 p.m., Daniel confessed in a tape-recorded statement, placing the blame primarily on defendant. At 7 p.m., having listened to portions of Daniel's statement, defendant himself confessed to Officer Fred Dreis. At midnight, the brothers were interviewed by Dr. Wait Griswold, a psychiatrist. On 7 July 1978, at 11:20 a.m., defendant repeated his confession in detail to Johnny Bolden, a criminal investigator for the San Diego County District Attorney's office. Finally, at 1 p.m. on 7 July 1978--an hour before he was arraigned--defendant confessed to Officer Ronald Newman.<sup>4/</sup>

When one of defendant's sisters visited him in jail on 15 July 1978, he told her, "Now, I guess because I killed those two boys, they were only 16 years old, then robbed the bank and kidnaped them was because I really wanted to die." Defendant's last extrajudicial confession was made to a fellow inmate. Asked why he had killed the boys, defendant answered, "I couldn't have no punks running around that could do that [identify him], so I wasted them."

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<sup>4/</sup> The details of defendant's confessions will be given when we discuss his contention that the last of the four confessions, the one to Officer Newman, should have been suppressed on the ground his arraignment was unnecessarily delayed.

Testifying in his own behalf at the guilt phase, defendant admitted the bank robbery but denied kidnaping, robbing and murdering the two boys. He explained his pretrial confessions as attempts to protect his brother.

#### PENALTY PHASE

In 1975 defendant pleaded guilty to voluntary manslaughter of James Wheeler.

Wheeler and his wife lived with defendant's brother Ken and his wife; defendant and his wife lived next door. At the scene, defendant admitted beating Wheeler to death but claimed he had done so to protect the victim's wife when her husband threatened her with a knife. Later, just as in the present case, defendant repudiated his confession and sought to shift the blame to his brother, claiming Ken had killed Wheeler and that he had confessed to protect Ken. This is the story defendant told when testifying in the present proceeding. However, defendant's former wife and his niece testified defendant, without provocation, beat Wheeler to death while mockingly claiming to teach his victim self defense. During this sadistic attack defendant also cut off Wheeler's hair and threw matches at him after squirting him with lighter fluid. Defendant's former wife admitted she lied to the

grand jury investigating Wheeler's death explaining defendant had threatened to kill her too if she did not support his story.

Defendant continued to lead a life of violence while in jail awaiting trial on the present charges.

Defendant was housed in a "tank" consisting of a dayroom and adjoining cells. A guard approaching the tank overheard a conversation between defendant and other inmates in which reference was made to a knife. When the guard left to advise his superior a search should be conducted, one of the inmates, realizing a search was likely, told defendant to hide the "shank."<sup>5/</sup> Defendant went to his cell, removed from a box a piece of metal, which was approximately 10 inches long and sharpened on 1 edge. He then returned to the dayroom and concealed the shank underneath a table top where guards found it minutes later.

The next day defendant presided over a kangaroo court and found another inmate, Keith G., guilty of cowardice. Defendant told Keith he would have to submit to sodomy or lose his life. Keith was then taken into a cell, forced to

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<sup>5/</sup> A "shank" is a knifelike implement fashioned by a prisoner from available materials.

his face down on the bunk with his trousers pulled down and forcibly subjected to sodomy by three inmates, including defendant. Later in the day his assailants demanded Keith play strip poker with them. When Keith would not pick up his cards he was taken into the shower room and forced to orally copulate defendant and another inmate. Removed from the tank when he reported the assaults, Keith later encountered defendant in a holding area. Despite the presence of guards, defendant loudly and repeatedly threatened Keith's life.

Six days after the assaults upon Keith were reported, defendant's cell was searched. In the toilet a large water-soaked wad of tissue was found. Wrapped in the tissue was a 17-inch wire with looped ends in which the short pencils available to inmates might be inserted as handles. The guard who found this garrote said, "Look what I found, Bobby." Defendant, laughing, replied, "Aw, looks like you have me now."

Defendant's testimony during the penalty phase indicated he had a dismal childhood. When defendant was approximately 11 years old, his father served two separate prison terms for having sexual relations with defendant's sisters. The family then followed the harvest from state to state with defendant's mother and her boyfriend.

Defendant's schooling ended in the seventh grade. Defendant's mother forced him to leave the family when he was 14, saying he was not working hard enough. He soon stole a car and served four years in federal institutions for that crime, escape and a separate instance of attempted escape. He was subsequently imprisoned for the voluntary manslaughter of James Wheeler. Defendant was 26 years old at the time of trial.

Defendant admitted his testimony at the guilt phase--that he had nothing to do with killing the boys--was a lie. Changing his story, defendant testified he had not planned to kill the boys, that his brother had fired first, and "the next thing I knew I was shooting them myself."

Defendant claimed he was "sorry" about the murders. In support of this claim, defendant called Deputy Sheriff Michael Mendoza who testified that when he inquired into defendant's emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared remorseful. However, defendant admitted on cross-examination he had told a jail visitor his attorney wanted him to express remorse and he was not going to do so.

## DISCUSSION

None of the many contentions raised by defendant has merit. Indeed, none comes close to demonstrating prejudicial error. Nevertheless, because defendant's life is at stake, each will be fully discussed.

### I

Defendant contends the trial court erred in denying his motion for change of venue based on prejudicial pretrial publicity.

A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. (People v. Welch (1972) 8 Cal.3d 106, 113; Frazier v. Superior Court (1971) 5 Cal.3d 287, 294; Maine v. Superior Court (1968) 68 Cal.2d 375, 383.) Whether raised on petition for writ of mandate or on appeal from judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable. (People v. Welch, supra; People v. Tidwell (1970) 3 Cal.3d 62, 68-69; Maine v. Superior Court, supra, 68 Cal.2d at p. 382.) The factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status



of the defendant in the community, and the popularity and prominence of the victim. (People v. Salas (1972) 7 Cal.3d 812, 818.)

Of these factors, two weighed in favor of a change of venue in this case. Murder is, of course, a crime of the utmost gravity, and these murders were especially heinous. Press coverage of the crimes was extensive and included such information as that defendant was on parole for manslaughter, that his brother had confessed and had placed the blame principally on defendant, and that defendant himself had confessed. Two factors were neutral. Although the murdered boys were popular among their friends and their families were respected in their neighborhood, there is no indication the victims or their families were "prominent." (Cf. Maine v. Superior Court, supra, 68 Cal.2d at p. 388; Frazier v. Superior Court, supra, 5 Cal.3d at p. 293.) Defendant lived in the same community as his victims and worked in San Diego. The final factor--the size of the community--tipped the balance against venue change.

The community in which this case was tried is quite unlike the communities involved in the cases upon which defendant relies. Of the fifty-eight California counties, San Diego County is third in population and



ninth in area. Moreover, the City of San Diego, where the trial took place, is the second largest city in this state. (State of Cal. Statistical Abstract (1979) pp. 1, 9, 12-15.) This is significant because the "adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." (People v. Manson (1976) 61 Cal.App.3d 102, 189, and cases cited therein.) That the populous metropolitan character of the community dissipated the impact of pretrial publicity in this case was made clear on voir dire.

"A significant difference between pretrial and posttrial review is that after conviction in determining whether a defendant received a fair and impartial trial under the 'reasonable likelihood' standard, the review is retrospective. It extends to an examination of what actually occurred at trial." (People v. Martinez (1978) 82 Cal.App.3d 1, 13.) In other words, voir dire may demonstrate that pretrial publicity had no prejudicial effect. (See Murphy v. Florida (1975) 421 U.S. 794, 800-802; People v. Sommerhalder (1973) 9 Cal.3d 290, 303-304; People v. Manson, supra, 61 Cal.App.3d at pp. 187-188; People v. Whalen (1973) 33 Cal.App.3d 710, 716.)

Before discussing the voir dire in this case, it should be emphasized that the controlling cases

"cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." (Murphy v. Florida, supra, 421 U.S. at p. 799.) "It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Irvin v. Dowd (1961) 366 U.S. 717, 722-723.)

Examined under these guidelines, the voir dire clearly indicated pretrial publicity did not have the effect of denying defendant his right to a fair and

impartial jury. Four of the jurors chosen had not been exposed to any pretrial publicity. Of the remainder, none remembered anything in the least damaging to defendant, none knew anything about his background, and none had formed an opinion concerning his guilt or innocence.

## II

We now consider defendant's contention that the trial court erred in denying his mistrial motions. The two motions arose out of separate but related incidents. The first incident involved a transcript given to the jury to assist them in understanding a tape recording of one of defendant's extrajudicial statements. Defendant moved for a mistrial on the ground the transcript contained a reference to his having called his parole officer. The second mistrial motion was based on the prosecutor's having elicited from defendant during cross-examination the admission he had been convicted of a felony and was on parole. Neither motion proves to have had merit.

## A

As stated, because of acoustical problems members of the jury were furnished transcripts of defendant's extrajudicial statement to Officer Dreis. References to defendant's manslaughter conviction

were excised from the transcripts and the corresponding portions of the tape recording were not played for the jury. Well before trial, defense counsel was given a copy of the edited transcript. After reviewing it, counsel stated he had no objection. Despite these precautions, as the tape was being played for the jury, the prosecutor noticed in the transcript the reference to defendant's having called his parole officer. Commendably, the prosecutor immediately brought the problem to the court's attention. As a result the tape was stopped before the passage in question was played, the jury was asked to stop reading the transcripts, and a recess was ordered. During the recess the transcripts were left on the jurors' chairs and collected by the bailiff. Denying the mistrial motion with the observation he did not believe the jurors had read as far as the troublesome reference, the court offered to inquire whether the jurors had read that passage. This offer was declined by defendant, but with his approval the jury was carefully instructed they were to disregard anything they may have read in the transcripts if the corresponding portion of the tape recording had not been played for them.

First, defendant should not be permitted to raise this issue, having reviewed and approved the

transcript. Second, as the trial court pointed out, there is no reason to believe the jury read the statement in question. Third, if they did read the statement, we must assume they obeyed the instruction to disregard it. Finally, as will be explained below, inquiry by defense counsel following the guilt phase revealed the jury did not consider defendant's prior conviction during its deliberations.

B

Defendant's admission during cross-examination that he had previously been convicted of a felony and was on parole occurred under the following circumstances. Shortly after defendant was arrested, an evidence technician took nitric acid swabs of his hands to check for gunpowder residue. As the technician did so, defendant asked him whether the swabs would detect powder burns and pick up gunpowder particles. Upon being informed the test would reveal whether he had fired a gun recently, defendant stated he had been shooting in the Porterville area approximately 24 hours earlier. Defendant contradicted this statement at trial when he testified he had been in the San Diego area the day before the murders and had fired a gun near Miramar Lake. Defendant further testified he had not known of the murders, or of any shootings,

when the nitric acid swabs were taken, but was simply curious as to the purpose of the test.

The prosecutor pursued this line of inquiry further to demonstrate that in his conversation with the technician defendant manifested a consciousness of guilt--that defendant was concerned about the test because he knew he had gunpowder on his hands as a result of shooting the boys and that defendant lied to the technician about his activities the previous day to provide an alternative, innocent explanation for the powder traces. Defendant clearly realized he was being backed into a corner; rather than admit the truth, he blurted out that he was an ex-felon and on parole.<sup>6/</sup>

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6/ "Q. Well, why would you be concerned about gunpowder being on your hand at that time, then?

"A. Just curious.

"Q. You didn't know there had been a killing of two boys up to that time, did you?

"A. No.

"Q. Didn't know anything about a gun prior to that, did you?

"A. No.

"Q. But you asked Mr. Stewart if this swabbing would take gunpowder off your hand, didn't you?

"A. Yes.

"

"Q. Weren't you concerned that he would find evidence of your firing a gun that day when you killed the two boys?

"A. No.

"Q. It didn't bother you at all?

"A. Bother me? No, not then, no.

"Q. You weren't worried about there being evidence on your hands of firing a gun, right?

"A. Yes and no.

(Fn. 6 continued.)

This admission was obviously intended to provide a less damning explanation for defendant's concern that the swabbing would reveal that he had recently fired a gun, namely, that as a condition of his parole he was not to be in possession of a firearm.

Following defendant's admission there was a conference at the bench in which the prosecutor expressed surprise at defendant's answer and stated he would pursue the matter no further. Defendant's mistrial motion was denied on the ground that the prosecutor's questions were not intended to elicit the admission but that it had been volunteered by defendant. The jury was instructed that defendant's reference to being on parole for "some prior conduct" was not to be considered by them in determining his

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"Q. You were worried about it?

"A. Yes.

"Q. Why were you worried about it if there hadn't been any shooting?

"A. I'm not supposed to be around firearms or a pistol or even shoot a pistol.

"Q. Why aren't you supposed to be around a pistol?

"[Defense counsel:] Your Honor, I will object to the question.

"THE COURT: Overruled.

"[Defendant]: I was convicted of a felony.

"[Prosecutor]: And you were on parole?

"A. Yes.

"Q. So that is what you were worried about, is that what you are telling me now?

"A. Yes."



innocence or guilt of the crimes charged in this proceeding.

"Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide." (People v. Ing (1967) 65 Cal.2d 603, 611, and cases cited therein.) When a defendant voluntarily testifies in his own defense the People may "fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (People v. Schader (1969) 71 Cal.2d 761, 770.) Evidence relevant for these purposes is admissible even though it incidentally involves an unrelated offense. (People v. Crawford (1968) 259 Cal.App.2d 874, 880.)

Under these principles the prosecutor's cross-examination of defendant was entirely proper. Moreover, any error in this regard was cured by the instruction that the jury was not to consider defendant's admission in determining whether he committed the present offenses. That the jury followed this instruction was established by inquiry defense counsel was permitted to make of the jury following the guilt phase. At the hearing on



defendant's motion for new trial, defense counsel was asked by the court whether his inquiry of the jurors had shed any light on the issue. Counsel responded that none of the jurors he had interviewed was aware of defendant's prior conviction or had discussed the subject during deliberations.<sup>7/</sup>

### III

Defendant contends the trial court erred in denying his motion to suppress his confession to Officer Newman. Defendant had argued in support of the motion that his arraignment was unnecessarily delayed and that the challenged confession was obtained during the period of illegal detention. We need not resolve the question whether defendant was promptly arraigned. Even assuming arguendo he was not promptly arraigned, the delay would not necessarily have rendered his confession to Officer Newman inadmissible. "[D]elay in arraignment is but one factor to be considered in determining whether a confession is voluntary." (In re Walker (1974) 10 Cal.3d 764, 778-779; see People v. Kendrick (1961) 56 Cal.2d 71, 85; Rogers v. Superior Court (1955) 46 Cal.2d 3, 10-11.) It is not

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<sup>7/</sup> The contention raised in a supplemental brief --that trial counsel violated his obligations to defendant by telling the court what the jurors told him--is as offensive as it is absurd.

contended, nor could it be, that defendant's confession to Officer Newman was involuntary.

Defendant was arraigned on the present charges 48 hours and 55 minutes after he was arrested for the bank robbery. The challenged confession was the last of four made by defendant during this period and occurred approximately an hour before he was arraigned. The parties stipulated to the following chronology. Defendant and his brother Daniel were arrested for the bank robbery and taken to the police station for interrogation concerning that crime at 1:05 p.m. on 5 July 1978. At 4 p.m., Daniel first informed the officers of the murders; 10 minutes later the victims' bodies were found at the location described by Daniel. At 6:30 p.m., Daniel confessed in a tape-recorded statement, placing the blame primarily on defendant.

At 7 p.m., having listened to portions of Daniel's statement, defendant confessed to Officer Dreis. (It is not contended with regard to any of these confessions that defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436 were violated.) Defendant told Officer Dreis: "Danny thought I was going to let them go. He didn't know I was going to kill them. Danny was about 20 feet away sitting down when I shot them. I shot one and he spun around. I then

shot him in the head because I didn't want him to suffer. I chased the other and shot the other boy about three times. Danny was scared and he didn't shoot either of them. I think I took the .22 and shot the blond kid one time. I was pretty loaded and didn't know what I was doing. I had smoked two joints before this came down. My brother was terrified. I didn't know what I was doing."

At midnight defendant and his brother were transported to the office of Dr. Wait Griswold, a psychiatrist, and interviewed by him concerning the murders. Defendant told Dr. Griswold he had shot the victims after assuring his brother they would not be hurt.

Defendant and his brother were booked into jail in the early morning hours of 6 July 1978. On 7 July 1978, at 11:20 a.m., defendant repeated his confession in detail to Investigator Bolden. He told Bolden, among other things, that he and his brother planned to steal an automobile for use as a getaway car in the bank robbery; that he had approached the victims' car, pulled his pistol out of his waistband, entered the back seat of the car and ordered the boys to drive away; and that he shot John Mayeski in the chest and

head with the pistol, then chased Michael Baker and upon catching him, shot the boy three or four times with the pistol, and, finally, went back to Mayeski and shot him with the rifle.

The challenged confession was given to Officer Newman at 1 p.m. on 7 July 1978--an hour before defendant was arraigned. Defendant contends this confession was crucial to the People's case, despite its being the last of the four confessions. He argues its detailed character was used by the People to impeach defendant's testimony at trial that he had no part in kidnaping, robbing and murdering the two boys; that his brother was solely responsible for the crimes; that his confessions were attempts to cover up for his brother, and that he learned the details of the crimes from his brother while they were detained at the police station. Be that as it may, it is clear the delay in his arraignment did not affect the voluntariness of defendant's confession to Officer Newman. There is no reason to believe that confession was less voluntary than his previous confessions, the first of which was given 42 hours earlier, just 6 hours after his arrest.

#### IV

Defendant contends he was deprived of his

constitutional and statutory right to be present personally at all trial proceedings. (See Cal. Const., art. I, § 15; Pen. Code, §§ 977, 1043.) As the People's case-in-chief drew to a conclusion, a hearing was held in the absence of the jury as to the admissibility of the People's exhibits theretofore marked for identification. There was also a brief review of the question whether the jurors should have been polled by the court as to whether they had read defendant's reference to his parole status in the transcript of his interview with Officer Dreis. The record clearly indicates defendant was not present at this hearing; it also reveals, with equal clarity, his counsel did not object to his absence. Given the nature of the matters under discussion, defendant's presence was not necessary to protect his interests. Accordingly, the court did not err in holding the hearing in defendant's absence. (See People v. Jackson (1980) 28 Cal.3d 264, 309-311.)

V

Defendant contends the trial court erred in instructing the jury by failing to properly limit the purposes for which other-crimes evidence might be considered.

Tailoring CALJIC No. 2.50 (1977 revision) to the facts of this case, the court instructed the jury: "Evidence has been received tending to show that the defendant committed a crime other than that for which he is on trial. Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show one or more of the following: The identity of the person who committed the crime, if any, of which the defendant is accused; a motive for the commission of the crime charged; the existence of the intent which is a necessary element of the crime charged; that the defendant had knowledge of the nature of things found in his possession; that the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purposes."

Defendant expressly concedes the instruction was correct insofar as it related to motive; that is, defendant concedes the evidence he subsequently robbed the bank using the murder victims' automobile as a getaway car was admissible as tending to show his motive in committing the murders. However, defendant contends the instruction was erroneous insofar as it permitted evidence of the uncharged crime to be considered for the other purposes mentioned.

Before discussing those other purposes, we note there is no merit in the People's argument that defendant is precluded from raising this issue by his failure to object to the instruction below. Section 1259 provides in relevant part: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Italics added; see People v. Hannon (1977) 19 Cal.3d 588, 600.)

However, there is merit to the People's argument that evidence of the uncharged offense was admissible on the questions of identity, means and intent. That defendant later the same day robbed a



bank with the pistol used to murder the boys, driving as a getaway car the automobile stolen from the boys, certainly tended to show both that he had the means necessary to commit the murders and that he did in fact commit the murders. The evidence was also admissible on the question of intent, indicating as it did that the murders were committed in furtherance of the planned bank robbery.

The relevance of the bank robbery on the remaining issue--"that the defendant had knowledge of the nature of things found in his possession"--is unclear. However, despite the reference in the instruction to "a crime," evidence was introduced concerning another uncharged offense--the burglary of Jim Corbin's residence and the theft of his guns. These guns were the stolen property defendant was charged with receiving, and his participation in the theft of the guns clearly tended to show he knew they were stolen.

## VI

Defendant contends the trial court erred in refusing to give requested instructions on diminished capacity resulting from voluntary intoxication.

The principles governing the duty of the trial court to instruct on diminished capacity were



reiterated recently in *People v. Flannel* (1979) 25 Cal.3d 668. "In substance when diminished capacity is at issue a trial court first evaluates the evidence. If defendant proffers evidence enough to deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded that there was diminished capacity sufficient to negate the requisite criminal intent' [citation], the court must so instruct. A trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect. [Citations.] In other words, '[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.' [Citation.]" (25 Cal.3d at pp. 684-685.)

The trial court explained its refusal to instruct on diminished capacity as follows: "I think I indicated in our informal discussion that the Court in viewing this evidence was satisfied that we did not have a basis for diminished capacity instructions. [¶] First of all, we have no expert testimony in that regard. We have direct evidence on the part of the defendant

that even the marijuana that he had admittedly smoked did not in any way interfere with his knowledge of what he was doing. He did not claim any mental black-outs; he did not claim anything that would ordinarily go to the question of mental state in terms of diminished capacity, and I see no reason for giving those instructions."

Defendant contends substantial evidence of diminished capacity was elicited by the People from Officer Dreis when he testified that, in confessing to the murders, defendant told him: "I was pretty loaded and I didn't know what I was doing. I had smoked two joints before this came down. . . . I didn't know what I was doing."

Respondent points out, however, defendant repudiated that statement at trial. "Q Now, you weren't so under the influence of marijuana on [the day of the murders] that you didn't know what you were doing, were you? A No."

Moreover, defendant's statement to Officer Dreis, even if not repudiated, would not have constituted sufficiently substantial evidence of voluntary intoxication to warrant instructions on diminished capacity. The statement amounted to nothing more than a self-serving claim that, after smoking two

"joints" of marijuana, "I didn't know what I was doing." There was no indication how soon before the murders he smoked the marijuana. Nor, as the trial judge pointed out, was there any expert testimony on the effect that amount of marijuana would have on a person such as defendant.<sup>8/</sup> Contributing to our conclusion that the evidence of diminished capacity was insubstantial is the testimony of defendant's brother. Danny Harris testified defendant smoked one "joint" of marijuana approximately an hour before the murders and did not appear to be significantly intoxicated. Defendant's gait and speech were normal; he could understand what was said to him and could make himself understood. Finally, defendant's several detailed confessions belie his claim he did not know what he was doing.

In *People v. Carr* (1972) 8 Cal.3d 287, this court noted with approval: "It has been held that merely showing that the defendant consumed some alcohol prior to commission of the crime without showing the effect of the alcohol on him is not sufficient to warrant an instruction on diminished

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<sup>8/</sup> The importance of expert testimony for a claim of diminished capacity based on voluntary intoxication was recently emphasized in *People v. Frierson* (1979) 25 Cal.3d 142.

capacity." (8 Cal.3d at p. 294.) The Carr court went on to say: "Similar rules should apply to the consumption of marijuana." (Id., at p. 295.)

Bearing these rules in mind, we may profitably compare the evidence of marijuana intoxication in this case with cases in which this court has held evidence of alcohol intoxication to be too insubstantial to support instructions on diminished capacity. In *People v. Flannel*, supra, this court stated: "[W]e are of the opinion that defendant presented no substantial evidence of intoxication. First, defendant consumed relatively small amounts of alcohol over a long period of time. In the early morning, somewhere about 10 a.m., defendant drank about four tall cans of beer and a shot or two of gin. He then went shopping with his girl friend, and ate a sandwich for lunch. Between 2:30 and 4 that afternoon defendant drank a couple of beers and a shot of whiskey. In *People v. Bandauer* [1967] 66 Cal.2d 524, 528 [58 Cal.Rptr. 332, 426 P.2d 900], we found evidence of intoxication insufficient to require an instruction on diminished capacity if the defendant had 'six or seven beers during the six hours he was at various bars . . . , and he did not appear to be intoxicated.' Similarly, in *People v. Spencer* [(1963) 60 Cal.2d

64,] 88-89, we found evidence of intoxication 'minimal,' and therefore erroneous instructions immaterial, when defendant testified that he had had '"about three shots of whiskey" and some beer, and was "pretty well plastered."' Having observed defendant's behavior, the arresting police officers, however, testified that defendant was not under the influence of intoxicating liquor." (25 Cal.3d at p. 685.)

#### VII

Defendant contends the excusal of juror Susan McDevitt was error under *Witherspoon v. Illinois* (1968) 391 U.S. 510. Witherspoon holds that a prospective juror with scruples against the death penalty may not be excused for cause on that basis unless he makes it unmistakably clear he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial. (391 U.S. at p. 522, fn. 21.) That standard was clearly satisfied here.

The critical exchange occurred during voir dire by defense counsel.

"Q . . . are you saying that in no instance could you ever vote for the death penalty?

"A According to my own conscience? I would not use the death penalty, no.

"Q Are you saying you could never in any instance, if you are selected as a juror, vote for the death penalty?

"A No, never.

"Q If you were chosen as juror and the Court instructed you that it was your duty to consider both penalties, is it your testimony that you could not do so; that you would automatically and without regard to any evidence vote against the death penalty?

"A That's according to my own conscience.

"Q That is your belief?

"A Yes."

Defense counsel thereupon stated he had no further questions of Ms. McDevitt, the prosecutor challenged her for cause, and the court excused her. The exclusion was proper.

#### VIII

Defendant contends the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt and substantially increases the risk of conviction. This contention, voiced on appeal and amplified in a petition

for writ of habeas corpus which we earlier denied (In re Harris, Crim. 21341, denied by minute order on 22 October 1980), lacks merit. (Hovey v. Superior Court (1980) 28 Cal.3d 1.)

## IX

We now consider defendant's contention that the trial court made a number of erroneous evidentiary rulings during the penalty phase.

### A

Defendant contends the court erred by permitting the People to call defendant's wife in rebuttal without having given him notice as required by section 190.3.

Then, as now, section 190.3 provided in relevant part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to



the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." (Italics added.) The italicized exception is applicable here. No notice was required because the People called defendant's wife to rebut his testimony in mitigation.

B

Defendant contends psychiatrist Wait Griswold, testifying for the People in rebuttal during the penalty phase, usurped the function of the jury, "set[ting] himself up as a human lie detector concerning whether or not [defendant] felt remorse for his having killed the victims."

Defendant himself raised the question of remorse. As stated, having claimed during the guilt phase to have had nothing to do with the murders, defendant recanted that testimony during the penalty phase, expressly admitting the crimes and stating he was "sorry." He then sought to support his claim of remorse by calling Deputy Mendoza who testified



that when he inquired into defendant's emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared to feel remorse for his crimes.

Dr. Griswold's testimony on direct examination was entirely unobjectionable. The psychiatrist testified he had examined defendant and was of the opinion he had an "antisocial personality"--a character disorder also known as "sociopathic" or "psychopathic" personality. Dr. Griswold stated sociopaths are commonly manipulative and, drawing upon his extensive experience as a prison psychiatrist, explained that in prison this manipulative tendency might be expressed by "ingratiating themselves with prison personnel [and] by . . . making what appear to be suicidal gestures in order to call attention to themselves or to manipulate themselves out of a difficulty."

Framing his question carefully, the prosecutor did not ask Dr. Griswold whether he believed defendant when he said he was remorseful. Rather, he asked, "if a person were truly a sociopath and had committed the crimes of the type that you discussed with [defendant], would you expect that

person to truly feel remorse for those crimes?" Dr. Griswold responded, "No, I would not." It was defense counsel who asked Dr. Griswold whether he credited defendant's claim of remorse. Asked on cross-examination, "So you venture no opinion whether or not he is remorseful at this time," the psychiatrist responded, "No opinion except that I would doubt it very much." The prosecutor carefully avoided encroaching upon the jury's province when he examined Dr. Griswold on direct. If defense counsel failed to exercise such care in cross-examining the psychiatrist, defendant may not now be heard to complain of the lapse.

C

Defendant contends the court erred in refusing to admit testimony of Clinton Duffy, former warden of San Quentin, and Howard Brodie, a CBS correspondent and courtroom artist, explaining how the death penalty is carried out. Evidence presented at the penalty phase should focus on "the character and record of the individual offender and the circumstances of the particular offense." (Woodson v. North Carolina (1976) 428 U.S. 280, 304.) The proffered testimony had no bearing on those issues and thus was properly excluded.

D

Concluding this line of argument, defendant contends the court erred in admitting evidence that while in jail awaiting trial for the present offenses defendant was found in possession of a wire garrote and prison-made knife. Defendant is precluded from raising this issue on appeal by his failure to preserve the point by appropriate objection in the trial court. (Evid. Code, § 353; People v. Rogers (1978) 21 Cal.3d 542, 547-548.) Moreover, the evidence was clearly admissible under section 190.3, which in relevant part provided then, as now: "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction." (Italics added.) Possession of the garrote and the knife clearly involved an implied threat to use force or violence.

X

Defendant contends that instructing the jury pursuant to former CALJIC No. 8.89 was error

under former section 190.4, subdivision (b), and  
People v. Gainer (1977) 19 Cal.3d 835.

Former CALJIC No. 8.89 provided in pertinent part: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant. After having considered all of the evidence in this case and having taken into account all the applicable factors upon which you have been instructed, you shall determine whether the penalty to be imposed on defendant shall be death or confinement in the state prison for life without the possibility of parole." (Supp. Service, pamp. No. 1 (1978).)

Former section 190.4, subdivision (b), provided in pertinent part: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Added by Stats. 1977, ch. 316, § 12, pp. 1260-1262, and repealed by § 9 of Initiative

Measure approved Gen. Elec. 7 Nov. 1978.)<sup>9/</sup>

Defendant argues that instructing the jury it "shall determine" whether the penalty is to be death or life imprisonment without possibility of parole creates the false impression that there is no third alternative, namely, deadlock.

People v. Gainer, supra, is inapposite. No "dynamite" instruction of the sort condemned in Gainer was given here. This jury was never deadlocked. It was not instructed that the case "must at some time be decided." (Cf. People v. Gainer, supra, 19 Cal.3d at pp. 841, 851-852.) Nor were minority jurors admonished to reconsider their opinions in light of the fact that the majority had taken the opposite position. (Id., at pp. 841, 847-851.) Moreover, CALJIC No. 17.40, the continued use of which was commended in Gainer, was given here.<sup>10/</sup> No error appears.

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9/ Section 190.4, subdivision (b), now provides that a new jury is to be impaneled to try the penalty issue if the original jury is unable to reach a unanimous verdict. Upon a second failure to reach unanimity, the judge has discretion to impanel a third jury or to impose a life sentence without possibility of parole. (Added by § 10 of Initiative Measure approved Gen. Elec. 7 Nov. 1978.)

10/ CALJIC No. 17.40 provides: "Both the People and the defendant are entitled to the individual

(Fn. 10 continued.)

XI

Finally, defendant contends imposition of the death penalty under the 1977 statute would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Defendant admittedly does no more than ask us to reconsider the various arguments rejected in *People v. Frierson* (1979) 25 Cal.3d 142, 172-188 (opn. by Richardson, J.). We decline to do so. (See *People v. Jackson*, supra, \_\_\_ Cal. 3d \_\_\_\_.)

None of defendant's contentions having merit, the judgment imposing the death penalty is affirmed.

CLARK, J.

WE CONCUR:

RICHARDSON, J.  
NEWMAN, J.

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opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." (4th ed. 1979.)

C O P Y

PEOPLE v. HARRIS

Crim. 20888

CONCURRING OPINION BY TOBRINER, J

For the reasons set forth in the dissenting opinions of the Chief Justice and Justice Mosk in People v. Jackson (1980) 28 Cal.3d 264, I continue to believe that the death penalty statute under which defendant was convicted is unconstitutional. Until the majority opinion in Jackson is reversed by the United States Supreme Court or is overruled by a majority of this court, however, I consider myself bound by that decision's holding. Because I agree with the present majority's conclusion that under Murphy v. Florida (1975) 421 U.S. 794, the record in this case does not demonstrate that defendant was denied a fair trial, I concur in the judgment.

TOBRINER, J.



C O P Y

PEOPLE v. HARRIS

Crim. 20888

DISSENTING OPINION BY BIRD, C.J.

I respectfully dissent.

I.

These are terrible crimes of which appellant stands convicted, exceptionally cold-blooded and senseless. The reaction of San Diego County to their commission is understandable and, perhaps, even natural. The question before this court, however, is whether, amidst the clamor which attended that county's most notorious crime of the year, it is reasonably likely that appellant was not accorded a fair trial -- "the most fundamental of all freedoms"<sup>1/</sup> -- on the issues of guilt or of punishment.

Press coverage<sup>2/</sup> of appellant and his crimes began with his capture for bank robbery on July 5,

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<sup>1/</sup> Estes v. Texas (1965) 381 U.S. 532, 540.

<sup>2/</sup> This opinion uses the terms "press" and "publication" to refer not only to written journalism but also to the television and radio broadcast media.



1978. Two citizens observed appellant and his brother Daniel leave the bank after the robbery, and one of them followed the brothers as they drove back to their residence. This witness notified the police, and a combined "SWAT" and FBI team soon surrounded the house where appellant and Daniel were arrested. The police siege of the home was broadcast over local television, and the arrest of the robbers was the lead story in the San Diego Evening Tribune.<sup>3/</sup>

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<sup>3/</sup> With a circulation of 131,000 newspapers daily (except Sunday), the Evening Tribune is the second ranking newspaper in San Diego County. The San Diego Union has the largest circulation (200,000 daily; 300,000 Sunday). Other newspapers with substantial circulation in the county include the Los Angeles Times (41,000 daily; 52,000 Sunday), the Escondido Times-Advocate (31,000), the El Cajon Daily Californian (14,000), and the six Sentinel Newspapers (total local circulation 85,000). San Diego County has a population of about 1.7 million persons of whom 800,000 are registered voters. (Cal. Sect. of State, Rep. of Registration (Oct. 1978) p. 4.)

It is appropriate at this point to note some of the more obvious difficulties that arise when one attempts to determine the impact of publicity upon a jury pool by comparing a newspaper's circulation statistics with the gross population of the county. At the outset, it has been recognized that a newspaper's circulation statistics -- that is, the number of copies sold or given away -- significantly understates the number of persons actually reached by that paper. For example, a family would generally purchase only one copy of a newspaper to be shared among all family members.

On the other hand, since at least some individuals or businesses subscribe to more than one newspaper, one cannot obtain the number of newspaper subscribers simply by adding up the circulation statistics of each paper in the county.

(Fn. continued)

while initially the incident appeared to the press and, apparently, to law enforcement authorities to be "simply" a bank robbery, the situation quickly changed. Daniel told about the murders, laying the blame on appellant. The officers were shown the murder site by Daniel and the local television stations broadcast the recovery of the victims' bodies.

The story was front page news the following day (July 6th) in the San Diego Union (two front page stories), the Evening Tribune (four front page stories), and the Los Angeles Times (one story). The headlines described the crimes as "senseless murder" and observed that the community of Mira Mesa was "stunned." The Union mentioned that appellant was on parole from prison, that

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(Fn. 3 continued)

Finally, an assessment of the impact of adverse publicity upon a county's potential jury pool cannot accurately be obtained by comparing the number of persons reached by the publicity with the total population of the county. San Diego's gross population -- 1.7 million -- includes numerous persons who are statutorily ineligible to serve as jurors, for example, aliens and persons under the age of 18 years. A more realistic estimate of the jury pool's size might be registered voters. (See Code Civ. Proc., § 204e.) (There were 800,000 registered voters in San Diego County at the time appellant's jury was selected.)

Taking into account these various caveats, it seems reasonable to conclude that the several newspapers listed at the beginning of this footnote do have an extensive readership among persons constituting the jury pool of San Diego County.

at age 11 he had been arrested for cruelty to animals and burglary. Articles in the Evening Tribune related in both headline and text that appellant was on parole for a previous homicide and that his mother was herself on probation for bank robbery. An interview with appellant's parole officer was reported. In it, the officer revealed further details of appellant's manslaughter conviction and of his prior record for escape from a youth camp and for running away from home. Another official related that appellant had been on welfare at the time of the previous killing and "[i]t was hard to believe the filth" in his home.

That evening a local television station broadcast an interview it had conducted with appellant's father. In an emotional statement, the father told the reporter of a conversation he had had with appellant following his arrest in which appellant had admitted the killings. The story was picked up and disseminated by United Press International (UPI). (Shortly thereafter, appellant's father left the area.)

The stories by UPI for each of the following two days reported appellant's status as an ex-felon. Similarly, on July 6th, 7th, and 8th, the Associated Press (AP) coverage included references to appellant's prior record, including his juvenile record and his escape from the youth camp. AP also published its own interview with

appellant's parole officer and with the prosecutor in the prior manslaughter case. The prosecutor (now a judge) was quoted as stating that the prior homicide was a "stabbing death."

By July 7th, Daniel's confession to the police had been released to the press. It was reported that day in the Union, the Evening Tribune, the Times-Advocate, the Daily Californian, and the Vista Press, as well as by AP and three local television stations. The front page coverage in the Union included as headline "The Chilling Story of How 2 Boys Died." The text of the article reported the police account of Daniel's statements that appellant "thought up the whole thing" and that appellant shot one of the victims as he walked along carrying his hamburger. The Tribune's front page story was headlined "2 Boys Were Shot Without Warning." The text also noted the boys' bullet-riddled bodies and partially eaten hamburgers. A deputy coroner was reported as indicating that one of the boys had been shot without warning in the back.

The July 7th Union ran a separate story, headlined "Killings Suspect On Parole For '75 Slaying." Included in this article was an extensive interview with a member of the Imperial County Sheriff's Department. This officer detailed the facts surrounding appellant's prior

conviction and opined, "I knew he [appellant] was going to pull something. He beat that guy to death [in 1975] . . . beat him so hard on the head, he died of hemorrhaging."

The Union also published an editorial entitled, "Sorrow and Indignation," which stated: "We must bespeak the sense of grief and outrage that San Diegans share over the[se] mindless murders . . . [¶] The circumstances of this tragedy are particularly appalling. . . . [¶] Because the horrible crime that snuffed out the lives of these young men could have happened to anyone, public sorrow and indignation are also tinged with fear." It further noted the "widespread belief that murderers may be paroled within a few years. This awful belief is well founded . . ." since the two victims' "murderer was not kept behind bars where he belonged." The editorial concluded: "If this crime, which could involve a confessed murderer paroled too early, can result in having punishment more nearly fit the crime in California, then [the victims] will not have died for nothing."

Further coverage in the Union, the Times, and the Daily Californian notified their readers that appellant's mother had been convicted for bank robbery. AP and UPI did the same. Appellant's prior manslaughter conviction was the subject of coverage by the Times-Advocate, the Vista Press, the Daily Californian, and AP.

On July 8th, the Union published another article concerning Daniel's confession and appellant's prior conviction. Headlines noted that the prosecution was seeking the death penalty for appellant. The article reported that there was considerable community outrage at the decision of the Community Release Board (C.R.B.) to parole appellant for the manslaughter conviction. A high ranking prison official was quoted as stating, "it's a reality that the Community Release Board made a mistake in this case . . . ."

That day's edition of the Evening Tribune carried similar reports about the prosecution's decision to seek the death penalty. Calling the offenses an "apparent willful execution of two innocent teen-agers," the chief deputy district attorney stated that "[t]he death penalty is designed to deal with this kind of offense." He also was quoted as stating that the evidence indicated that Daniel "did not personally participate" in the killings. The chief deputy further admitted that it might be difficult to empanel an impartial jury in the county after the published reports of Daniel's confession which laid the blame for the shootings on appellant.

The Times of July 8th contained the story of Daniel's confession, an interview with the judge who had been the prosecutor during appellant's prior manslaughter



proceedings, and an observation that the victims "appeared to have been shot down in cold blood." It again noted that appellant's mother had been convicted of bank robbery.

On Sunday, July 9th, the Union published a front page story and photograph of the funeral of one of the victims. The story quoted extensively from the minister who presided at the funeral and who described the perpetrators as "cruel, selfish, heartless people devoid of feeling and devoid of conscience." The article referred to appellant's status as a parolee for manslaughter, and it reiterated the prosecution's decision to seek the death penalty. The article then observed that no execution had been carried out in California in 11 years.

Later that same day, a television station conducted a one-question public opinion poll on its "Telepulse" show: "Do you agree with the death penalty demand in murder of two Mira Mesa youths?" Viewers phoned in their responses: 690 yes, 70 no.

On July 10th, both the Union and the Evening Tribune carried stories on the funeral of the second victim. The latter's article was on the front page. On July 11th, the Union published an article concerning the mother of one of the deceased boys and noted appellant was an "ex-convict on parole from a 1975 manslaughter conviction . . . ."

The Evening Tribune of July 12th carried a front page article under the headline, "Slain boy's mother finds words: It's senseless." The story stated that appellant was on parole for "a stabbing death." Accompanying the article was a large photograph of one of the deceased boys performing stunts on his bicycle. An article in the Times again referred to appellant's prior conviction and parole status. The Mira Mesa Sentinel carried one story about the victims' funerals and a second story and an editorial concerning the citizens who had aided in appellant's capture. The Sentinel reported that a sports scholarship had been set up by the local P.T.A. to honor the victims' memory and that another fund was collecting contributions for their families. It also related appellant's prior conviction, as did three local television stations. These stations also broadcast interviews with appellant's parole officer. Another newspaper editorialized: "With a past history of violent crime, and a murder conviction, to boot, what was Robert Harris doing on the streets?"

Two days later, the entirety of the Union's letters to the editor page was devoted to letters of outrage at the crimes and at the C.R.B.'s release of appellant. Appellant was called a "recidivist psychopath" and a "subhuman type." In the days which followed, other letters were printed demanding the death penalty for



appellant. The Union's editorial cartoon on July 17 showed pollution from a pipe labeled "Paroled Murderers" being poured into a stream labeled "Society."

In the next two days, the Union and the Tribune carried brief stories on the scholarship fund which had been created as a memorial to the two youths. And on July 19th, a television station broadcast an editorial, asking "whether this man, an ex-convict, should have been out of prison in the first place. Harris was paroled last January after serving less than two and a half years for beating to death a 19-year-old friend after a drinking spree. . . . Parole authorities rejected the warnings by an Imperial County sheriff's officer, familiar with the case, that Harris was a potential danger to society."

About this time, the publicity surrounding this case in San Diego County developed a new aspect, as the two major prosecutorial officers in the county became engaged in a sharp public dispute over which office would "get first crack" at prosecuting appellant. The local United States Attorney's office was responsible for the prosecution of the bank robbery offense, and the county district attorney for the homicides. Each office issued statements indicating what sentence appellant would likely obtain if convicted in its respective court. The United States Attorney claimed that the federal charges were an

"insurance policy" against appellant's early release by the parole board. After the district attorney's office responded that it was seeking the death penalty -- a punishment not available in the federal courts for bank robbery -- the United States Attorney held a televised news conference at which he expressed the opinion that the California death penalty law was unconstitutional.

The district attorney's office took the public position that if the federal charges were tried first, the state might lose the opportunity to try appellant and obtain a death sentence. The district attorney attempted to delay appellant's arraignment in federal court, and members of the office accused the United States Attorney of "political grandstanding." The United States Attorney responded that it was the county prosecutors who were "grandstanding."

When the federal authorities obtained a trial date of October 3, the Tribune noted this "tightens the race between the two jurisdictions as to which will be the first to try the case." An assistant district attorney described the "competition" between his office and the federal prosecutors as an "awkward situation." On August 7, the district attorney was able to have the state trial set on a date earlier than October 3, and the press reported that the district attorney had "moved ahead" in

his efforts to "beat federal authorities to the punch in prosecuting the Harris brothers."

Attorneys in the district attorney's office privately told the press that the motivation of the United States Attorney was "politics." They claimed "he is politically ambitious and . . . he knows the case will receive a lot of publicity . . . ." The United States Attorney responded that he was merely seeking "maximum protection of the community." Members of the district attorney's office were said to "scoff" at this justification.

On August 10, the Union published a lengthy article on the jurisdictional dispute, reporting that a senior federal parole officer "disputed" the United States Attorney's computation of appellant's federal sentence. This official, who calculated a prison term "far under" the term mentioned by the United States Attorney, "cannot understand why [the United States Attorney] is insisting on prosecuting the two brothers from Visalia." County prosecutors were again said to claim that federal involvement was "for the sake of publicity." An assistant legal counsel for the C.R.B. computed for the Union that "the least" appellant would serve in state prison would be a term of years well beyond the term calculated by the federal parole officer.

These events were duly reported by the Union, the Times, the Evening Tribune, and by the local television stations over a two and one-half week period from July 20th through August 10th, and beyond.

Coverage was not limited during this time period to the political dispute. Articles appearing in the Times of July 22d and 25th and August 8th and in the Union and the Tribune of July 22d and 25th and August 9th all reported further events in the case. On August 12th and 13th, the press reported that the confessions of both appellant and his brother had been introduced at their preliminary hearing. The Times story was headlined, "Harrises Bare Guilt to Them, Officers Testify." Portions of Daniel's confession were particularly publicized. According to police witnesses, appellant told Daniel that he wanted to kill everyone in the bank, and only after Daniel pleaded "there would be no more killings" did appellant relent. The Times carried Daniel's assertions that appellant had eaten the victims' hamburgers and had asked, "Wouldn't it be fun to pose as police officers and inform the next of kin that their son had been murdered?" Daniel was reported to be so fearful of appellant that he requested -- and was permitted -- to be kept in a jail cell separate from appellant.

Meanwhile, community reaction to the crimes was being expressed in other ways. The P.T.A.'s of seven schools combined to set up the memorial athletic scholarship in Mira Mesa. A local stereo store advertised that a portion of its income would be donated to that fund. Another memorial fund was set up to collect contributions to the boys' families. The bank which had been robbed gave rewards to three persons who had helped in the capture of appellant. It also took out large advertisements to laud the three, and the Tribune published an editorial commenting on these advertisements and again praising the three citizens. In its news broadcasts, a television station presented two of the citizens with its Good Citizen Award.

Numerous other details about the crimes, the court proceedings, appellant's background, and the victims were reported and reiterated in the press. Appellant and Daniel were consistently referred to as the "brothers from Visalia" (Tulare County). The two victims were described as popular teenagers and best friends. The father of one of the boys was a police officer who participated in appellant's arrest; a sister of one of the boys was inside the bank when Daniel and appellant robbed it. These facts and coincidences were widely disseminated by the press. Further coverage was given to statements by an officer in

Imperial County that he had unsuccessfully tried to prevent appellant's release on parole. A prison official was quoted as saying the C.R.B. had made a "mistake" by paroling appellant.

By mid-August members of the district attorney's office admitted to the press that this case received "the most news coverage of any this year in San Diego." Polls conducted that month by both the prosecution and defense more than substantiated this admission. Although differing considerably in their methodology, the pollsters for both sides found an extremely high public awareness of the crime. As one pollster stated, "this is the highest awareness factor in any of the polls that I have done regarding awareness of a particular alleged crime." Indeed, so well known was this case that by September 1st -- only five days prior to the hearing on the change of venue motion -- the Union published an editorial addressing the contemplated release from prison of two persons convicted of murder. The editorial was entitled "From Worry to Outrage" and stated: "San Diegans cannot forget the case of a paroled killer now charged with the vicious slaying of two teenagers, unfortunate enough to cross his path."

After the change of venue motion was denied, appellant filed a petition for a writ of mandate, seeking



to overturn that ruling. The petition was summarily denied by the Court of Appeal and by a four-to-three vote in this court.

Although diminished somewhat in frequency, the publicity given to this case by the press continued well past the change of venue motion. The extent and nature of the coverage between that motion and jury selection, can be gleaned by the fact that one prospective juror, who was called to try this case, indicated that he had been in Alaska during the entire summer and "didn't know a thing about [the case] until [he] returned in September," but he "read in the paper quite a bit about it since then." Although this juror recalled "not a great deal" of the details of the case, he had read enough to enable him to form the opinion that appellant was guilty. He was excused for cause.

Another indication of the extent of pretrial publicity comes from the voir dire in this case. Nearly 11 full court days were needed to obtain a jury of 12. Ninety-six prospective jurors were voir dired for those twelve positions. Of the 96, 90 percent had some prior information about the case, ranging from vague recollections to certainty of appellant's guilt. Twenty of the ninety-six were excused for cause due to the publicity, and appellant exhausted his twenty-six peremptory challenges.

Of those who had prior knowledge, most obtained their knowledge from publicity or discussions prior to coming to court, but four prospective jurors with no prior knowledge of the offense received information from other prospective jurors in the jury lounge. Indeed, of 13 jurors who were asked or volunteered information about what was occurring in the jury lounge, 11 indicated they had heard such discussions. One prospective juror told the court that "[m]any people expressed opinions with reference to guilt or innocence;" another indicated that in the jury lounge conversations she overheard, "their opinion had already been formed;" a third indicated he heard discussions "throughout the jury lounge."<sup>4/</sup>

Of the twelve jurors empanelled to decide the case, nine had some exposure to the pretrial publicity, and one juror, who had no prior exposure, heard jury room discussions. Among the twelve who served, one had seen the television interview with appellant's father, although this juror claimed to remember only that the father was "really broken up;" he did not mention that the father told the television reporter his son had admitted committing the killings. A second juror indicated that

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<sup>4/</sup> At one stage in the voir dire proceedings, the trial judge called in the prospective jurors and admonished them to stop discussing the case in the jury lounge.



this case "was duly noted by I think everybody in our circle when the incident, you know, came to the news." This juror stated that "I imagine I did" express or form an opinion regarding appellant's guilt, but this was not a "definite judgment[]," and she indicated she had no opinion on guilt "at this time." The remaining jurors admitted to having less knowledge than these two.

## II.

The right to a "fair trial in a fair tribunal" is a basic component of due process.<sup>5/</sup> So basic is this principle that it has been termed "the most fundamental of all freedoms."<sup>6/</sup> "It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. [Citations.]" (Nebraska Press Assn. v. Stuart (1976) 427 U.S. 539, 586 (conc. opn. of Brennan, J.).)

The Supreme Court has "insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'" (Sheppard v. Maxwell (1966) 384 U.S. 333, 350, citation omitted.)

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<sup>5/</sup> In re Murchison (1955) 349 U.S. 133, 136.

<sup>6/</sup> Estes v. Texas, supra, 381 U.S. at page 540.

Thus, whenever there appears a "reasonable likelihood" that the dissemination of potentially prejudicial news prior to the trial will prevent a fair trial, the trial must be postponed until the threat abates or the case is transferred to another county not so permeated with publicity. (*Id.*, at p. 363; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383-384; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 54.)

The courts have identified several dangers to a fair trial which are relevant to the present case. Such a danger can exist if there is bias against the accused, as when the community harbors hostility toward the suspect and/or when pretrial publicity is inflammatory. Recognizing that the press both reflects<sup>7/</sup> and shapes<sup>8/</sup> the community's pattern of thought, courts have looked to the nature and extent of press coverage as a means of ascertaining bias or hostility toward an accused. Courts have also looked to other factors from which community bias might be inferred, such as the status of the accused in the community, the status of the victim, the nature of the offense, the size of the community, and whether the case becomes involved in local politics.

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<sup>7/</sup> See *Irvin v. Dowd* (1961) 366 U.S. 717, 725.

<sup>8/</sup> See *Irvin v. Dowd*, *supra*, 366 U.S. at page 726; see also *Clifton v. Superior Court* (1970) 7 Cal.App.3d 245, 251.

A second and separate kind of danger to a fair trial may result if extensive pretrial publicity has tended to establish the accused's guilt. As the Court of Appeal has stated, "[a] reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility. [Citation.] When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (Corona v. Superior Court (1972) 24 Cal.App.3d 872, 877.)

In determining the likelihood of this form of prejudice, the courts look again at the extent and content of press coverage. Especially significant in this regard is whether there has been widespread publicity concerning confessions or admissions by the accused, accusations by an alleged crime partner, prior similar criminal conduct by the accused, or statements by presumably knowledgeable officials indicating their belief in the accused's guilt.

The record in the instant case contains virtually every factor which this court has heretofore considered relevant to the resolution of a change of venue question. The record is replete with indications of community bias. The press reported the "stunned" reaction of the community

to the murders and consistently mentioned the "outrage," "disgust," "indignation," and "fear" shared by San Diegans as a result.

Only a few days prior to the hearing on the change of venue motion, the county's largest newspaper wrote that "San Diegans cannot forget" these "vicious" killings. Appellant was described by members of the community as "cruel, selfish, heartless" and "devoid of feeling, and devoid of conscience." A police officer was widely quoted as stating appellant was dangerous, unstable, and violent. The press reported that even appellant's brother Daniel was afraid of him and that Daniel "was happy to be [in confinement] away from his older brother." Press coverage of even routine court appearances frequently mentioned that appellant was brought to court in chains. (Cf. People v. Duran (1976) 16 Cal.3d 282.)

Appellant was graphically portrayed in a cartoon as sewage polluting the community. In the letters to the editor, he was called a "subhuman type," a "recidivist psychopath," a "dreadful man," and a "beast." There were demands for his execution, and an announcement that citizens will "speak out and act if justice is not served . . . ."

Appellant's criminal history was a constant subject of public attention. The press frequently noted his arrest at age 11 for cruelty to animals. Other arrests and convictions for auto theft, runaway, escape from youth camp, burglary, and parole violation were brought out. His prior status as a welfare recipient and the "filth" of his house were deemed newsworthy. Even his mother's conviction for bank robbery was prominently featured. Most damaging, however, was appellant's prior manslaughter conviction, the details of which were repeated many times. The press carried interviews with a judge who had been the prosecutor for this offense, with police officers involved in its prosecution, and with his parole officer. Appellant was referred to by the leading newspaper as a "paroled killer."

The community was incensed that the C.R.B. had paroled appellant. This anger was expressed in editorials, in letters to the press, in comments by local law enforcement officials. The press recounted the efforts of a police officer in another county to prevent appellant's parole. Stories were carried attributing to prison officials the admission that it had been a "mistake" to release appellant. Editorials attacked the "feeble excuses" and "lame responses" of the C.R.B. for releasing appellant.

In prior decisions, this court has found the status of the accused and the victim to be significant. For example, in *Fain v. Superior Court*, supra, 2 Cal.3d at page 52 -- a case in which a change of venue was ordered -- the court noted that the defendant "had been a resident of the . . . area [where the crime took place] for only a few months prior to the crimes, and had not been integrated into the community." The same can be said of appellant; indeed, appellant and his brother Daniel were routinely referred to as "brothers from Visalia." Appellant's contacts with yet another county (Imperial) were amply emphasized in connection with the reportage of his prior manslaughter conviction there.<sup>9/</sup>

In *Fain*, this court also considered the fact that "the victims were popular local teenagers, whose fate drew expressions of public sympathy and aroused hostility towards the defendant[]." (2 Cal.3d at p. 51.) In the

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<sup>9/</sup> The majority opinion asserts that appellant "lived in the same community as his victims and worked in San Diego." (Maj. opn., ante, at p. \_\_\_\_.) This assertion does not accurately reflect the way appellant was portrayed by the press. Usually, he was said to be "from Visalia." According to one newspaper in Mira Mesa, appellant was a "transient renter." At the very least, appellant was no more integrated into the community than was the defendant in *Fain*, supra, whose minimal community ties were held to be a factor favoring a change of venue.

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\* Typed opn., p. 12.

present case, too, the victims were also teenagers popular in their community, best friends on their way to go fishing when kidnaped; and one of them was the son of a police officer.<sup>10/</sup> Public sympathy and tribute came in many forms. The Union noted the "hundreds of people -- strangers, mostly -- who rushed to [the] comfort" of the victims' families. Funeral arrangements were made for one family by a church of another faith.

A college scholarship fund was set up in memory of the boys by the P.T.A.'s of seven schools, and another fund collected donations for their families. The existence of these funds was publicized countywide. A local retail establishment advertised that it would donate portions of its income to the scholarship fund. Rewards were given to citizens responsible for appellant's capture. The bank took out advertisements lauding them, the county's largest newspaper praised them, and a major television station gave them its Good Citizen Award.

This court has also observed that the nature and gravity of the crime, as reported in the press, " may

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<sup>10/</sup> Prior to the deaths of the boys, neither they nor their families were known outside the community of Mira Mesa. Their virtues were, however, made known to the county at large following their deaths, and the community's warm sympathy was displayed countywide. As the mother of one of the boys explained, "the whole of San Diego was just fabulous."



reasonably be taken into consideration in determining the risk of prejudice." (Fain v. Superior Court, supra, 2 Cal.3d at p. 54; see also Maine v. Superior Court, supra, 68 Cal.2d at p. 385.) Appellant's was a capital crime of utmost gravity. Moreover, the shocking nature of the case was thoroughly explored in the press. A deputy coroner told the press that one boy had been shot without warning in the back and that the other boy was flushed out of hiding and killed. At a press conference, the prosecutor termed the slayings an "apparent willful execution of two innocent teenagers." Gruesome details were frequently noted, from appellant's eating the victims' food to his desire to notify the boys' families of the slayings.

In addition, this case took on political overtones as the two major prosecutorial offices in the county engaged in public maneuvering in order to be first to bring appellant to justice. (Cf., People v. Tidwell (1970) 3 Cal.3d 62, 71; see also Maine v. Superior Court, supra, 68 Cal.2d at pp. 386-387.) Each side in the dispute seemed to boast about the severity of the sentence appellant would receive in its jurisdiction. Each accused the other of "grandstanding." The United States Attorney was said to be "playing politics." The press perceived the situation as a "race" between two antagonistic competitors.



Much of the publicity discussed thus far not only revealed community bias toward appellant but also assumed his guilt: the prior conviction for homicide (see *People v. Fries* (1979) 24 Cal.3d 222, 230); the reported details of the crime; and the expressions by the prosecutor and other local officials as to appellant's guilt. In addition, however, the press on numerous occasions carried the story of Daniel's statements, which laid the full blame for the murders on appellant. Appellant's own admission to the crimes was carried over television, via an emotional interview with appellant's father. This broadcast was seen by at least one of the jurors who decided appellant's guilt. His confession was disclosed when the preliminary hearing transcript was made public.

One relevant factor which this court has considered in the past but which is not present in the instant case is the small population of the community from which the jury is drawn. San Diego County is populous, in terms of both absolute numbers and voter registration. (Cf., ante, fn. 3.) However, "population size alone is not determinative." (*Fain v. Superior Court*, supra, 2 Cal.3d at p. 52, fn. 1; see also *Smith v. Superior Court* (1969) 276 Cal.App.2d 145, 150; *Lansdown v. Superior Court* (1970) 10 Cal.App.3d 604, 609-610.)

Contrary to Fain, Smith, and Lansdown, today's majority opinion appears to find that the size of the community is controlling. (Maj. opn., ante, at p. \_\_\_\_.\*) The majority blithely ignore the cases in which changes of venue have been ordered from populous counties, including one county which is considerably larger than San Diego. (See Smith v. Superior Court, supra, 276 Cal.App.2d 145 [L.A. County, population 7 million];<sup>11/</sup> Lansdown v. Superior Court, supra, 10 Cal.App.3d 604 [Kern County, population 300,000].) The fallacy of the majority's reasoning was fully set forth in Smith: "Carried to its logical conclusion, the [majority's] argument, if valid, would require that all motions for a change of venue in [a populous county] must be denied because of its population, regardless of the amount of pretrial publicity which surrounds a notorious criminal case. This contention is disposed of by the court in Maine in the following language: 'We do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely.'" (276 Cal.App.2d at p.

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<sup>11/</sup> Smith was cited with approval on this point in Fain v. Superior Court, supra, 2 Cal.3d at page 52, footnote 1.

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\* Typed opinion at page 12.

150, quoting from *Maine v. Superior Court*, supra, 68 Cal.2d at p. 387, fn.13.)

The majority's apparent elevation of the population factor to preeminent status is all the more unfortunate in this case, because, unlike the Manson case<sup>12/</sup> upon which the majority partially rely, the pervading publicity surrounding the crimes was limited to two counties at most. Thus, alternative forums for appellant's trial were readily available.

The majority also assert that the pretrial publicity in this case did not prejudice appellant at trial. They seek to prove this proposition by reference to the voir dire examination of the 12 jurors empanelled to try this case. This effort to establish a lack of prejudice is unpersuasive.

As this court has long recognized, the fact that "it was possible to select [jurors] who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had." (*People v. McKay* (1951) 37 Cal.2d 792, 798, emphasis added.) Primary among the reasons for this rule are the difficulties inherent in identifying, uncovering, and preventing juror prejudice

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<sup>12/</sup> *People v. Manson* (1976) 61 Cal.App.3d 102.

flowing from pretrial publicity.<sup>13/</sup> Thus, jurors' declarations of impartiality are not dispositive. (Sheppard v. Maxwell, supra, 384 U.S. at p. 351; People v. Tidwell, supra, 3 Cal.3d at p. 73.)

The United States Supreme Court recently articulated alternative tests for determining when due process requires a conviction to be set aside on appeal as the result of pretrial publicity. (Murphy v. Florida (1975) 421 U.S. 794.) Under these tests, the refusal to grant a motion for a change of venue will require reversal if, but only if, prejudice at trial is presumed, is inherent, or is inferable.

Under the first test in Murphy, prejudice is "presumed" and a judgment of conviction must be reversed when "the influence of the news media . . . in the community at large . . . pervaded the proceedings."<sup>14/</sup>

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<sup>13/</sup> See, inter alia, Irvin v. Dowd, supra, 366 U.S. at pages 727-728; Sheppard v. Maxwell, supra, 384 U.S. at page 362; Murphy v. Florida (1975) 421 U.S. 794, 803; Nebraska Press Assn. v. Stuart, supra, 427 U.S. at pages 566-567; Maine v. Superior Court, supra, 68 Cal.2d at pages 380, 382-383; People v. Tidwell, supra, 3 Cal.3d at page 73; Lansdown v. Superior Court, supra, 10 Cal.App.3d at page 609; Corona v. Superior Court, supra, 24 Cal.App.3d at pages 878-879, 881.

<sup>14/</sup> According to the complete quotation from Murphy, prejudice is presumed in cases where "the influence of the news media, either in the community at

(Id., at pp. 798-799.) Murphy cited Rideau v. Louisiana (1963) 373 U.S. 723 as a proper application of this "presumed prejudice" test. (See 421 U.S. at pp. 798-799.) In Rideau, the defendant had confessed under police interrogation to the murder of which he stood convicted. A twenty-minute film of his confession was broadcasted three times by one television station in the community where the crime and the trial took place. One of the broadcasts was viewed by an audience estimated to be about 50,000 persons in a community of 150,000.

Believing that the televised film "in a very real sense was Rideau's trial" to those who viewed it, the Supreme Court reversed the conviction "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury. . . ." (Rideau v. Louisiana, supra, 373 U.S. at pp. 726, 727, initial emphasis in original, subsequent emphasis added.) The court held that "due process of law in this case required a trial before a jury drawn from a community of people who

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(Fn. 14 continued)

large or in the courtroom itself, pervaded the proceedings." (Emphasis added.) Since this language is framed in the alternative and since there is no claim in the present case of overbearing press influence "in the courtroom itself," that portion of the quotation is deleted. (Cf. Estes v. Texas, supra, 381 U.S. 532; Sheppard v. Maxwell, supra, 384 U.S. 333.)

had not seen and heard Rideau's televised 'interview.'  
(Id., at p. 727.)

In situations where prejudice is not "presumed," the Murphy court held that a "totality of circumstances" test should be applied. (421 U.S. at p. 799.) Under this test, the appellate court determines whether either (1) "the jury-selection process . . . permits an inference of actual prejudice" or (2) "the setting of the trial was inherently prejudicial . . . ." (Id., at p. 803.) The court explained that even where no actual prejudice on the part of the trial jurors can be shown or inferred from the voir dire transcript, this factor "might be disregarded in a case where the general atmosphere in the community . . . is sufficiently inflammatory . . . ." (Id., at p. 802.)

The instant appeal undeniably involves one factor similar to that which invoked the "presumed prejudice" test in Rideau: a local television station broadcast a dramatic interview with appellant's father in which the father tearfully revealed appellant's confession to him. While this interview was not broadcast three times as in Rideau, and did not portray appellant himself, nevertheless this publicity must at least be considered to have substantial impact under the "totality of circumstances" test. This impact would be especially relevant to the empanelled juror who admitted to viewing the broadcast.

In my view, appellant has more than met the "totality of circumstances" test. An examination of the jury-selection process as a whole -- which Murphy requires, see 421 U.S. at page 803 -- discloses that 90 percent of the prospective jurors had been exposed to pretrial publicity or discussions about the case.<sup>15/</sup> Many jurors admitted they had felt horror or shock when the crime was disclosed in the press. And as one juror frankly admitted, it would take some "mind-rendering to erase maybe what I have felt." Indeed, one of the twelve jurors finally empanelled to try appellant's case stated "I imagine I did" form or express an opinion as to his guilt as a result of pretrial publicity. She stated, however, that she had no opinion "at this time" concerning guilt or innocence. She did not indicate what, if anything, had occurred to cause her to retreat from her initial opinion.

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<sup>15/</sup> This figure of 90 percent probably understates the actual proportion of such jurors. Courts have noted that jurors may not admit they have knowledge of pretrial publicity. (See, e.g., *Corona v. Superior Court*, supra, 24 Cal.App.3d at pp. 878-879.)

There is a strong indication that the jurors in this case were not immune from this tendency. According to a newspaper account of the preliminary voir dire of the first 12 jurors, when asked if they had read or heard about this case, "All 12 jurors raised their hands, some of them reluctantly and only after looking around to see the response of the others."



An especially disturbing aspect of the jury-selection process in this case was the report during voir dire of discussions by potential jurors in the jury lounge. According to the record, many people expressed the opinion that appellant was guilty. True, the trial judge did at one point call the jurors back into the courtroom specifically to admonish them against such conversations. However, such an admonishment is a double-edged sword. While it may deter future jury room discussions, the stern admonishment also reduces the likelihood that jurors, subject to voir dire thereafter, will admit to having heard or participated in these discussions.

In the final analysis, however, it is the inherently prejudicial setting of this case that tips the scales in favor of reversal. When the accused is portrayed as "sewage" polluting society, when the public is treated to the sorry spectacle of prosecutorial offices publicly vying with each other to have "first crack" at convicting the accused, when the accused's prior homicide conviction becomes a routine part of the continuing press coverage of the case, when the state prison system is assailed for its "mistake" in releasing the accused and a public official admits the same, when the prior record of the accused's mother is deemed to be newsworthy, when a



television station broadcasts the father's tearful recitation of his son's confession, then "the setting of the trial [is] inherently prejudicial." (See *Murphy v. Florida*, supra, 421 U.S. at p. 803.)

Under the totality of the circumstances, this case should be reversed so that a fair trial may be conducted.

### III.

There are some particularly disturbing ramifications of the majority's holding in this case on the penalty phase decision of a capital trial.

The pretrial publicity in this case is important for another reason. The underlying but unmistakable message of the pretrial publicity as a whole was that the only appropriate punishment for appellant was death.<sup>16/</sup> This leads to an important point.

At the penalty phase of a capital trial, the jury has the especially delicate task of deciding whether the accused should live or die. Jurors are called upon to

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<sup>16/</sup> The message comes through in this fashion: appellant has killed before, yet he was released from prison into society by blundering or incompetent prison officials; he has killed again, thus proving he will forever be dangerous and is no more than refuse in our community; the only way to prevent a second mistaken release and yet another tragic killing is to take the matter away from the control of the prison officials; this can be done only by executing the appellant.

"express the conscience of the community . . . ."

(Witherspoon v. Illinois (1968) 391 U.S. 510, 519.) It is undeniable that jurors making the penalty decision are entitled to, and in fact must of necessity, exercise considerably more subjective discretion in performing this task than they do in reaching a decision on guilt or innocence. (See Adams v. Texas (1980) \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ [65 L.Ed. 2d 581, 590].)

The conscience of the community is expressed by assuring that the pool from which penalty phase jurors is drawn accurately reflects the community as a whole. In this way, the discretion exercised by those jurors will, in the long run, closely approximate that which would be exercised by the community as a whole. (Cf., generally, Hovey v. Superior Court (1980) 28 Cal.3d 1, 73-74.)

However, when a case produces a great deal of potentially prejudicial publicity, certain members of the community become ineligible to serve at the trial as a consequence of that publicity. They are removed from the pool of persons from which, inter alia, the penalty phase jury is drawn. Certain types of individuals tend to be removed from the pool as a result of pretrial publicity. It has been suggested that an "honest juror" will frequently find himself excluded. (See Corona v. Superior Court, supra, 24 Cal.App.3d at p. 879.) One might further

speculate that the "self-aware" juror may also tend to be excluded. But one type of juror will, almost by definition, tend to be removed in disproportionate numbers from the jury pool: the jurors who are informed and knowledgeable about current affairs.

Whatever the impact of the removal of these jurors upon the guilt determination, the impact on the penalty phase is likely to be devastating. At that phase, where jurors are given the most discretion and where the jury verdicts are supposed to express that undefinable quality known as the conscience of the community, the law removes from the jury those who are most informed about the community. Since extensive publicity tends to occur in connection with important cases, this removes these individuals in the very cases which are most significant.

There is no failsafe "solution" to this irony. However, a frank recognition of its existence would lead us to consider ways of mitigating its effect where possible. Such mitigation is readily available in capital cases like the present one, since intensive pretrial publicity was confined to a few counties in the state.

A change of venue to another county would have substantially restored the jury pool in this case to that which is available in a case of less notoriety. A change of venue would have made it possible for this court to

feel more secure that the verdict expressed in this case truly reflected the conscience of our California community.

#### IV.

Before the state can put to death one of its citizens, the accused must be found guilty after a fair trial by a jury selected from a cross-section of the community. In this case, appellant received neither. Under our case law, if a fair trial has been denied, the conviction must be reversed regardless of the evidence of the accused's guilt. (Irvin v. Dowd, supra, 366 U.S. at p. 722; People v. Tidwell, supra, 3 Cal.3d at p. 76; Maine v. Superior Court, supra, 68 Cal.2d at p. 384; People v. McKay, supra, 37 Cal.2d at pp. 798, 800.)

As this court explained more than a century ago, "The prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which Government is organized and Courts of Justice established will have definitively failed. Cases sometimes occur, and this would appear to be one of them, in which the very enormity of the offense itself arouses the honest indignation of the community to such a degree as to make it apparent that a dispassionate investigation of the case cannot be had.

Under such circumstances the law requires that the place of trial be changed." (People v. Yoakum (1879) 53 Cal. 566, 571.)

BIRD, C.J.

I CONCUR:

MOSK, J.

No. 82-1095

Office: Supreme Court, U.S.  
FILED

MAY 23 1983

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

R. PULLEY, Warden of the California  
State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

JOINT APPENDIX

JOHN K. VAN DE KAMP, Attorney General  
of the State of California,  
DANIEL J. KREMER, Chief Assistant  
Attorney General--Criminal Division  
STEVEN V. ADLER, Deputy Attorney General  
MICHAEL D. WELLINGTON,  
Deputy Attorney General  
110 West "A" Street, Suite 700  
San Diego, California 92101  
Telephone: (619) 237-7666  
Attorneys for Petitioner

ANTHONY G. AMSTERDAM,  
New York University School of Law  
40 Washington Square South  
New York, New York 10012  
Telephone: (212) 598-2638  
Attorney for Respondent

PETITION FOR CERTIORARI FILED DEC. 29, 1982  
CERTIORARI GRANTED MARCH 21, 1983

## JOINT APPENDIX

### Pages

Chronological list of Relevant Docket Entries	JA 1 - 6
Excerpt from Reporter's Transcript of Proceedings before the United States District Court for the Southern District of California on March 12, 1982	JA 7 - 26
Note regarding Opinion of the United States Court of Appeals for the Ninth Circuit	JA 27

CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO

People v. Robert Alton Harris, et al.  
CR No. 44135

Date	Proceedings
8/3/78	Information filed charging Robert Alton Harris with, inter alia, two counts of murder, two counts of robbery and two counts of kidnapping.
3/6/79	Judgment of death entered.

SUPREME COURT OF THE STATE OF CALIFORNIA

People v. Robert Alton Harris  
Crim No. 20888

2/11/81	Judgment affirmed on direct automatic appeal. ( <u>People v. Harris</u> (1981) 28 Cal.3d 935.)
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SUPREME COURT OF THE UNITED STATES

Robert Alton Harris v. California  
No. 80-6702

10/5/81            Petition for writ of cer-  
                      tiorari to the California  
                      Supreme Court denied.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO  
HC No. 5841

11/24/81            Petition for writ of  
                      habeas corpus denied.

COURT OF APPEAL OF THE STATE  
OF CALIFORNIA, FOURTH APPELLATE  
DISTRICT, DIVISION ONE

In re Robert Alton Harris  
4 Crim 13691

11/25/81            Petition for writ of  
                      haeas corpus denied.

SUPREME COURT OF THE STATE OF CALIFORNIA

In re Robert Alton Harris  
Crim No 22380

1/13/82            Petition for writ of  
                      habeas corpus denied.

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA

Robert Alton Harris v. R. Pulley, Warden  
Civil No. 82-0249-E

3/5/82            Petition for writ of  
                  habeas corpus filed.

3/11/82           Answer to petition filed  
                  by R. Pulley, Warden.

3/12/82           Hearing held in U.S.  
                  District Court on issues  
                  raised in petition.  
                  Petition denied on merits,  
                  and dismissed. Certificate  
                  of probable cause issued  
                  by U.S. District Court.  
                  Notice of appeal filed.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Robert Alton Harris v. R. Pulley, Warden  
No. CA 82-5246

3/12/82           Telephonic hearing in  
                  United States Court of  
                  Appeal for the Ninth

Circuit. Stay of execution granted. Expedited appeal ordered.

5/11/82

Oral argument held in United States Court of Appeal for the Ninth Circuit, San Francisco.

SUPREME COURT OF THE UNITED STATES

Robert Alton Harris v. California  
No. 81-6512

6/7/82

Petition for writ of certiorari to the California Supreme Court denied.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Robert Alton Harris v. R. Pulley, Warden  
No. CA 82-5246

9/16/82

Opinion of United States Court of Appeals for the Ninth Circuit issued.  
(Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189).)

11/15/82      Petitions for rehearing  
denied, opinion modified,  
stay of mandate to  
12/30/82, granted by  
United States Court of  
Appeals for the Ninth  
Circuit.

SUPREME COURT OF THE UNITED STATES

R. Pulley, Warden v. Robert Alton Harris  
No. 82-1095

Robert Alton Harris v. R. Pulley, Warden  
No. 82-6019

12/29/82      Petition for writ of cer-  
tiorari to United States  
Court of Appeals for the  
Ninth Circuit filed in  
Supreme Court of United  
States by R. Pulley,  
Warden (No. 82-1095).

1/7/83      Cross Petition for writ of  
certiorari to United States  
Court of Appeals for the

JA-6

Ninth Circuit filed in  
Supreme Court of United  
States by Robert Alton  
Harris (No. 82-6019).

3/21/83

Petition of R. Pulley,  
Warden, granted by Supreme  
Court of United States  
(No. 82-1095). Cross  
petition of Robert Alton  
Harris denied (No. 82-6019).

EXCERPT FROM REPORTER'S TRANSCRIPT  
OF PROCEEDINGS BEFORE THE UNITED  
STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA  
ON MARCH 12, 1982

[Reporter's Transcript at p. 34]

"[BY MR. SEVILLA:]

"I THINK THAT THERE IS SUFFICIENT EVIDENCE FOR AN O.S.C. TO ISSUE BOTH WITH RESPECT TO THE CONTENTIONS RAISED IN THE AFFIDAVITS, WHICH ARE CONTENTIONS OF FACT, WHICH I THINK SHOULD BE RESOLVED I DON'T THINK THE COURT -- OF COURSE, THE COURT HASN'T RECEIVED ALL THE EVIDENCE THAT COULD SUPPORT THOSE CONTENTIONS. IT HAS RECEIVED ALL OF THE EVIDENCE PETITIONER HAS DEEMED NECESSARY TO RAISE A PRIMA FACIE CASE; BUT, AT A HEARING, OF COURSE, HE WOULD SUPPLEMENT THOSE FACTUAL CONTENTIONS WITH ADDITIONAL EVIDENCE.

"IN ADDITION, I DON'T BELIEVE THE COURT HAS HAD LODGED WITH IT--AND I MAY BE MISTAKEN--THE RECORD FROM THE TRIAL COURT PROCEEDINGS.

"THE COURT: I DON'T HAVE THE TRIAL TRANSCRIPT. I HAVE THE VARIOUS BRIEFS."

\* \* \* \* \*

[Reporter's Transcript at pp. 65-75.]

"THE CLERK: PLEASE REMAIN SEATED AND COME TO ORDER. THIS UNITED STATES DISTRICT COURT IS ONCE AGAIN IN SESSION.

"THE COURT: GOOD MORNING AGAIN, LADIES AND GENTLEMEN.

"FIRST OF ALL, GENTLEMEN, I WANT TO THANK COUNSEL FOR THE MANNER IN WHICH THIS CASE WAS PRESENTED. I HAVE HAD THE RESPONSIBILITY THAT COUNSEL HAVE IN THIS CASE IN THE PAST; AND I REALIZE THAT IT IS A SIGNIFICANT AND AN ENORMOUS

RESPONSIBILITY. I THINK IT WAS VERY WELL EXECUTED BY ALL THE PARTIES TO THE LITIGATION.

"I WOULD JUST LIKE TO JUST GIVE YOU MY THOUGHTS BECAUSE, AS A PRACTICAL MATTER, I DON'T THINK, WITHIN THE TIME FRAME THAT WE ARE DEALING, THAT A COMPREHENSIVE, WRITTEN OPINION CAN BE RENDERED IN THIS CASE; SO I AM GOING TO EXPRESS MY THOUGHTS ABOUT MY REACTION TO THE PETITION AND THE DISCUSSION THIS MORNING.

"AS COUNSEL KNOW, THE PAPERS WERE FILED IN THIS COURT LESS THAN A WEEK AGO. THE ATTORNEY GENERAL TAKES THE POSITION THAT THE EMERGENCY NATURE OF THE PLAINTIFF'S REQUEST HERE IS ENTIRELY OF HIS OWN MAKING IN THAT THE DEATH PENALTY WAS AFFIRMED IN THIS CASE IN FEBRUARY OF 1981; THE SUPREME COURT DENIED THE WRIT OF HABEAS CORPUS IN



JANUARY OF THIS YEAR, MID-JANUARY. THE ATTORNEY GENERAL TAKES THE POSITION THAT TWO MONTHS HAVE GONE BY AND THAT THEY HAVE BEEN COMPELLED TO REPLY IN TWO DAYS. I THINK THERE IS PROBABLY SOME SUBSTANCE IN THE ATTORNEY GENERAL'S CLAIM BECAUSE IT IS A VERY SIGNIFICANT RESPONSIBILITY TO GIVE TO THE COURT IN THE LIMITED TIME FRAME GIVEN THE EXECUTION IS SET FOR TUESDAY OF NEXT WEEK.

"IN ANY EVENT, SINCE THE FILING OF THESE PAPERS, I HAVE REVIEWED THE PETITION TOGETHER WITH ALL OF ITS EXHIBITS; I HAVE REVIEWED THE RESPONSE ON THE MERITS, WHICH I HAVE REQUESTED OF THE ATTORNEY GENERAL; EXAMINED THE BRIEFS AND AUTHORITIES CITED BY PARTIES. I HAVE GIVEN THE ISSUES THAT HAVE BEEN PRESENTED CONSCIENTIOUS THOUGHT AND CONSIDERATION; AND I HAVE ALSO CONSIDERED THE ANALYSES THAT HAVE BEEN GIVEN TO

THOSE SELF SAME ISSUES, BY AND LARGE, BY OTHER REVIEWING COURTS.

"I HAVE IN MIND A REVIEW OF PEOPLE V. HARRIS, 28 CAL.3D; PEOPLE V. FRIERSON, 25 CAL.3D; PEOPLE V. JACKSON, 28 CAL.3D; AND, OF COURSE, GREGG V. GEORGIA AND THE FURMAN CASE, AMONG OTHERS.

"I THINK THE HISTORY OF THIS CASE IS WORTH NOTING. THE HOMICIDES HERE OCCURRED JULY 5, 1978. THE PETITIONER HAS GONE TO THE SUPREME COURT, I BELIEVE, TWICE PRIOR TO THE TRIAL OF HIS CASE, WHICH COMMENCED IN NOVEMBER OF 1978. THE DEATH PENALTY WAS AFFIRMED OVER A YEAR AGO. THE UNITED STATES SUPREME COURT HAS DENIED A HEARING IN THIS CASE. THE PETITIONER HAS PROCEEDED BY WAY OF WRIT OF HABEAS CORPUS THROUGH THE STATE SYSTEM--THROUGH THE SUPERIOR COURT AND THE DISTRICT COURT OF APPEALS,

AND THE CALIFORNIA SUPREME COURT HAS DENIED THE WRIT; SO HE HAS BEEN BEFORE THE HIGHEST COURT IN CALIFORNIA ON SEVERAL OCCASIONS AND BEFORE THE UNITED STATES SUPREME COURT ON OCCASION.

"I WOULD FIND THAT MOST, IF NOT ALL, OF THE ISSUES THAT HAVE BEEN PRESENTED HERE HAVE BEEN RAISED BEFORE IN THE TRIAL COURT, IN THE INTERMEDIATE APPELLATE COURTS OF CALIFORNIA AND THE SUPREME COURTS OF BOTH CALIFORNIA AND THE UNITED STATES; AND, AS MR. MC CABE POINTS OUT, DEFENDANT'S CLAIMS ON THOSE ISSUES HAVE BEEN REJECTED IN EVERY INSTANCE BY EACH OF THOSE COURTS.

"I CONSIDER THE MOST SIGNIFICANT ISSUES IN THIS CASE TO BE THE CONSTITUTIONALITY OF THE CALIFORNIA DEATH PENALTY STATUTE IN THE ATTACK THAT HAS BEEN MADE HERE AS TO PROPORTIONALITY REVIEW AND THE STANDARD OF PROOF; AND

THEN, THE MOST SERIOUS DEFECTS THAT ARE POINTED OUT TO ME THAT I CONSIDER SIGNIFICANT CONCERN THE TESTIMONY OF DR. GRISWOLD AS TO THE TESTIMONY HE GAVE AT THE TRIAL AND THE NATURE OF HIS TESTIMONY.

"AS I HAVE INDICATED, I THINK, IN THE TIME FRAME THAT WE ARE TALKING OF, IT WOULD BE IMPRACTICABLE TO FILE A WRITTEN MEMORANDUM DECISION. IN THE BEST OF ALL WORLDS, THAT WOULD BE THE APPROPRIATE MECHANISM FOR THE COURT'S DECISION. I HAVE ASKED THE COURT REPORTER TO IMMEDIATELY TRANSCRIBE THESE REMARKS THAT I MAKE SO THAT THEY CAN BE ANNEXED BY EITHER OF THE PARTIES TO ANY APPROPRIATE COURT OF REVIEW AS AT LEAST INDICATING THE DISCUSSION THAT WE HAD THIS MORNING AND THE REASONS THAT ARE MOST PERSUASIVE TO ME IN MY ANALYSIS OF THE MATTER.

"I THINK, ON THOSE ISSUES WHICH I HAVEN'T SPECIFICALLY DELINEATED, I FIND MYSELF IN AGREEMENT WITH THE WRITTEN OPINIONS THAT HAVE BEEN FILED IN THE STATE COURT AS TO THE RESOLUTION OF THOSE ISSUES WHICH HAVE BEEN RESOLVED AGAINST THE PETITIONER. I DON'T THINK THAT THEY RAISE SUBSTANTIAL FEDERAL ISSUES. I DON'T THINK THEY ARE OF CONSTITUTIONAL DIMENSION; AND I WOULD CONCUR IN THE RESOLUTION OF THOSE MATTERS THAT I DON'T SPECIFICALLY DISCUSS THAT HAVE PREVIOUSLY BEEN MADE BY THE TRIAL COURT AND THE APPELLATE COURT IN CALIFORNIA.

"SPECIFICALLY, AS TO THE CONSTITUTIONALITY OF THE CALIFORNIA STATUTE, THE PROPORTIONALITY REVIEW REQUIREMENT, I WOULD FIND, BASED UPON MY READING AND MY ANALYSIS OF THE CASES THAT HAVE BEEN CITED BY BOTH PARTIES, THAT PROPORTIONALITY REVIEW IS NOT REQUIRED. THE

SUPREME COURT HAS NOT MANDATED SUCH A REVIEW. IT IS NOT, IN MY JUDGMENT, A FEDERALLY MANDATED, CONSTITUTIONAL PREROGATIVE TO THE IMPOSITION OF THE DEATH PENALTY. IT IS A CONSIDERATION, AS COUNSEL HAVE DISCUSSED; BUT, I AM SATISFIED THAT BOTH FLORIDA AND TEXAS, WHOSE CASES WERE UPHELD BY THE SUPREME COURT ON THE SAME DAY AS GREGG V. GEORGIA, DO NOT HAVE EXPRESS PROVISIONS FOR PROPORTIONALITY REVIEW. I AM SATISFIED THAT, SINCE THE DECISIONS IN THOSE CASE, 1976, OTHER CASES INVOLVING STATUTE PROVISIONS WHICH DO NOT EXPRESSLY REQUIRE PROPORTIONALITY REVIEW HAVE BEEN DENIED HEARINGS IN THE UNITED STATES SUPREME COURT; AND I AM ALSO IMPRESSED BY JUSTICE RICHARDSON'S ANALYSES IN BOTH THE FRIERSON CASE AND, OF COURSE, THE JACKSON CASE WHERE HE DISCUSSES THAT SPECIFIC ISSUE; AND I AM SATISFIED THAT

I AGREE WITH HIS ANALYSIS AND THAT JUDICIAL PRECEDENCE DOES EXIST IN CALIFORNIA, AS HE CITES THE LYNCH CASE, 8 CAL.3D, FOR SUCH REVIEW.

"IN ANY EVENT, I FIND MYSELF IN AGREEMENT WITH JUSTICE RICHARDSON AND HIS ANALYSES OF THE REQUIREMENT OF PROPORTIONALITY REVIEW; AND I WOULD ADOPT HIS REASONS.

"AS TO THE REASONABLE DOUBT STANDARD WHICH IS ATTACKED HERE, THE REASONABLE DOUBT STANDARD DOES ATTACH TO THE FINDING OF SPECIAL CIRCUMSTANCES WHICH TRIGGER THE PENALTY PHASE OF THE DEATH PENALTY HEREIN MANDATED BY THE STATUTE; AND I WOULD FIND THAT, AS FAR AS I CAN DETERMINE, THE CALIFORNIA STATUTE IS PRETTY MUCH COMPARABLE IN ITS PROVISIONS AS TO THE STATUTE WHICH WAS UPHELD IN PROFFITT V. FLORIDA, WHICH WAS DECIDED THE SAME DAY AS THE GREGG CASE,

IN THAT THE AGGRAVATION AND THE MITIGATING CIRCUMSTANCES WOULD BE CONSIDERED BY THE TRIER OF FACT; AND, IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, THEN THE PENALTY OF DEATH MAY BE IMPOSED.

"I AGREE WITH THE ATTORNEY GENERAL'S POSITION AND HIS ANALYSIS PERTAINING TO THE REASONABLE DOUBT STANDARD; AND I WOULD SAY THAT CALIFORNIA HAS MANY SAFEGUARDS WHICH ARE NOT INHERENT IN MANY OF THE STATUTES THAT THE UNITED STATES SUPREME COURT HAS UPHELD AS BEING VALID AND PASSING CONSTITUTIONAL MUSTER. I WAS SURPRISED TO READ THAT SOME STATUTES, FOR EXAMPLE, DO NOT REQUIRE AN AUTOMATIC REVIEW BY THE HIGHEST COURT IN THE STATE. OF COURSE, CALIFORNIA, AS I SAY, HAS MANY PROCEDURAL PREREQUISITES TO THE IMPOSITION OF THE DEATH PENALTY



WHICH ARE NOT CONTAINED IN STATUTE WHICH HAVE BEEN APPROVED IN OTHER STATES.

"AS TO THOSE DEFECTS WHICH ARE URGED IN THE TRIAL ITSELF, AS TO DR. GRISWOLD'S TESTIMONY, I HAVE REVIEWED ESTELLE V. SMITH, AND AGAIN, I AGREE WITH THE ATTORNEY GENERAL'S POSITION. MIRANDA WARNINGS WERE GIVEN IN THIS CASE. THEY WERE NOT IN THE ESTELLE CASE. VERY SPECIFICALLY, AS POINTED OUT ON PAGE 33 OF THE PETITION HERE, THIS PETITIONER WAS TOLD, WITH PRECISION, THAT HIS STATEMENTS WOULD BE USED AGAINST HIM IN A COURT OF LAW. I WOULD THINK THAT THAT FULFILLS THE FUNCTION WHICH WOULD PERMIT A TRIER OF FACT HEAR THOSE STATEMENTS.

"I ALSO AGREE WITH THE ATTORNEY GENERAL THAT HARRIS v. NEW YORK WOULD BE APPLICABLE IN ANY EVENT; AND I VIEW IT AS A TRIAL QUESTION AND NOT RISING TO

CONSTITUTIONAL DIMENSIONS; BUT I HAPPEN TO AGREE WITH THE ATTORNEY GENERAL THAT, SINCE MIRANDA WAS GIVEN HERE, AND THE SPECIFIC WARNINGS GIVEN TO MR. HARRIS, THAT THAT STATEMENT SHOULD HAVE BEEN RECEIVED BY THE TRIER OF FACT.

"AS TO DR. GRISWOLD'S TESTIMONY ITSELF, I THINK IT'S APPROPRIATE TESTIMONY AGAIN, UNDER ESTELLE V. SMITH, WHICH CERTAINLY DOES NOT RULE OUT PSYCHIATRIC TESTIMONY IN THIS AREA. I THINK IT WAS GENUINE REBUTTAL TESTIMONY AND IS PROPERLY RECEIVED BY THE TRIER OF FACT AND, AGAIN, NOT OF FEDERAL CONSTITUTIONAL DIMENSIONS.

"I WOULD AGREE WITH THE RESOLUTION OF THAT ISSUE AGAINST THE PETITIONER AS IT HAS BEEN IN EVERY STATE PROCEEDING TO THIS POINT. WHAT I AM SAYING, GENTLEMEN, IS THAT I AM SATISFIED THAT THE CASE HAS BEEN EXAMINED WITH GREAT CARE BY

LEGAL SCHOLARS WHOSE OPINION I RESPECT, BY COURTS OF LAST RESORT IN CALIFORNIA AND THE UNITED STATES, BY JUDGES OF EMINENCE AND OF DIFFERING VIEWS AND PHILOSOPHICAL PERSUASIONS, AND ALL PREVIOUS REQUESTS FOR RELIEF THAT HAVE ESSENTIALLY BEEN SOUGHT HERE HAVE BEEN DENIED. I AM MINDFUL OF JUSTICE REHNQUIST'S VIEW WHICH HE EXPRESSED IN THE DISSENTING OPINION IN COLEMAN V. BALKCOM, B-A-L-K-C-O-M, CONTAINED IN 49 U.S.L.W. 3803, THAT THERE MUST BE AN END TO LITIGATION IN CASES OF THIS TYPE. I THINK THERE MUST BE AN END TO THE LITIGATION AT SOME POINT IN TIME.

"I AM AWARE THAT, EVEN IF I GRANTED A STAY OF SHORT DURATION IN THIS CASE AND THEN RESOLVED THE MATTER AGAINST THE PETITIONER, IF I GRANT ANY STAY, I THINK THAT WOULD HAVE THE EFFECT OF VACATING THE EXECUTION DATE UNDER

CALIFORNIA LAW, AND THAT DATE COULDN'T BE THEN RESET FOR AT LEAST ANOTHER 30 TO 60 DAYS; AND, IN MY MIND, THERE IS NO ASSURANCE THEN THAT, IF I DID GRANT THAT LIMITED RELIEF TO THE PETITIONER HERE, THAT ANOTHER FEDERAL JUDGE, LOOKING DOWN THE ROAD, MAY NOT UNEXPECTEDLY FIND HIMSELF FACED AS I WAS WITH VOLUMINOUS BRIEFS AND PETITIONS TEN DAYS BEFORE A SCHEDULED EXECUTION, WHICH WOULD THEN HAVE TO, OF COURSE, THEN BE RESCHEDULED AND THE WHOLE PROCESS THEN REPEAT ITSELF WITH ALL THE ACCOMPANYING TRAUMA TO ALL THE PARTIES AND ALL THE PERSONS WHO ARE INTERESTED SPECIFICALLY IN THIS LITIGATION.

"SO I HAVE CONCLUDED THAT THE CASE SHOULD BE DECIDED PROMPTLY AND MY CONCLUSIONS STATED; AND I WOULD FIND AND CONCLUDE, BASED UPON MY EXAMINATION OF THIS VOLUMINOUS RECORD, FIRST, THAT THE

EVIDENCE OF GUILT HERE IS OVERWHELMING;  
AND, BY THE DEFENDANT'S OWN ADMISSION,  
THERE IS ABSOLUTELY NO QUESTION OF GUILT.

"SECONDLY, THAT HE HAD A FULL  
AND FAIR TRIAL, TESTED BY EVERY LEGAL  
STANDARD OF WHICH I AM AWARE.

"THIRD, THAT HE WAS VERY ABLY  
AND EFFECTIVELY REPRESENTED BY A COUNSEL  
IN EVERY STAGE OF THESE PROCEEDINGS; AND  
BY THAT, I MEAN TRIAL AND EVERY PART OF  
THE APPELLATE PROCESS AND INCLUDING THIS  
HEARING.

"FOURTH, THAT THIS CASE HAS  
FAIRLY AND EXHAUSTIVELY BEEN REVIEWED  
BY EVERY LEVEL OF APPELLATE COURT IN A  
MINUTE, EXACTING AND COMPREHENSIVE  
FASHION.

"FIFTH, THAT, IF THE DEATH  
PENALTY IS THE LAW OF THIS LAND AND OF  
THIS STATE--AND IT IS AT THIS TIME--THAT  
HIS ACTIONS AND HIS CONDUCT AS PROVEN BY

THE COURT RECORD IN THIS CASE INDICATE THAT IT IS AN APPROPRIATE AND A DESERVED PENALTY IN THIS CASE.

"SIX, THAT THE SPECIFIC DEATH PENALTY LAW UNDER WHICH HE WAS CONVICTED AND SENTENCED, PENAL CODE SECTION 190, ET SEQ, IN MY JUDGMENT, PASSES CONSTITUTIONAL MUSTER AS SET OUT IN THE FURMAN/ GREGG SERIES OF CASES; AND THAT THE FINAL JUDGMENT WAS GIVEN AND REACHED ON THE PROCEDURES WHICH ACCORDED THIS PETITIONER, IN MY JUDGMENT, FULL AND COMPLETE DUE PROCESS OF LAW. HE IS ENTITLED TO NO LESS THAN THAT, AND HE OESERVES NO MORE THAN THAT; AND, FINALLY, I THINK THAT THIS CASE HAS FULLY RUN ITS COURSE AND THAT THE JUDGMENT SHOULD BE CARRIED OUT.

"IT'S MY VIEW THAT, THEREFORE, THE PETITIONER HAS NOT STATED THE SUFFICIENT LEGAL GROUNDS FOR RELIEF HE

SEEKS OR SHOWN THAT HE HAS BEEN THE VICTIM OF ANY FEDERAL CONSTITUTIONAL VIOLATION; THEREFORE, I WOULD DENY HIS PETITION FOR WRIT OF HABEAS CORPUS AND DISMISS HIS PETITION. HIS REQUEST FOR STAY OF EXECUTION WOULD BE DENIED. HIS REQUEST FOR ADDITIONAL HEARINGS WOULD BE DENIED. HIS PROBABLE REQUEST WHICH IS NOW MADE FOR THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE IS GRANTED; AND I WOULD DO EVERYTHING I COULD TO PERMIT AN EXPEDITED REVIEW OF THIS DECISION IF THAT BE THE DESIRE OF THE PETITIONER. I WOULD DO ALL THAT I COULD TO ASSIST IN THAT PROMPT REVIEW; BUT I WILL DECLINE TO ISSUE ANY STAY FOR THAT PURPOSE. ANY STAY, ANY STAY OF THE SCHEDULED EXECUTION DATE WOULD HAVE TO COME FROM ANOTHER AUTHORITY RATHER THAN THIS COURT. PETITIONER, I AM SURE, WILL SEEK IT IN THE NINTH CIRCUIT COURT OF APPEALS; AND IT

WILL BE UP TO THAT COURT WHETHER OR NOT SUCH A STAY WOULD BE GRANTED; BUT I WOULD NOT ISSUE A STAY FOR THAT PURPOSE.

"I WANT TO THANK COUNSEL AGAIN FOR THE MANNER IN WHICH THIS CASE WAS PRESENTED. I THINK IT DEALT WITH A VERY SIGNIFICANT ISSUE IN A VERY COMPREHENSIVE AND LAWYER-LIKE FASHION, AND IT WAS VERY PROFESSIONALLY PRESENTED.

"AS I HAVE INDICATED, I HAVE ASKED MRS. KING TO MAKE AVAILABLE TO EITHER COUNSEL AS SOON AS POSSIBLE TRANSCRIPTS OF THESE REMARKS SO IT MAY BE ANNEXED TO THIS PETITION FOR FURTHER RELIEF IN THE APPELLATE COURT FOR THE BENEFIT OF PARTIES AND OF THAT COURT.

"IF THERE IS NOTHING FURTHER, GENTLEMEN, THANK YOU VERY MUCH. I APPRECIATE YOUR PRESENTATION.

"MR. MC CABE: YOUR HONOR, WOULD THE COURT PERMIT THE FILING OF



A NOTICE OF APPEAL IN FORMA PAUPERIS  
WITHOUT THE NECESSITY OF THE USUAL  
DECLARATION OF THE PETITIONER GIVEN THE  
CIRCUMSTANCES?

"THE COURT: YES.

"THANK YOU, GENTLEMEN.

"MR. MC CABE: YOUR HONOR, ONE  
FURTHER MATTER: DO I UNDERSTAND THAT  
ALL OF THE EXHIBITS WHICH WERE PRESENTED  
TO YOU WERE ADMITTED AND ARE PART OF THE  
RECORD ON APPEAL?

"THE COURT: YES, SIR, THEY  
ARE.

"MR. MC CABE: THANK YOU.  
THAT'S ALL.

"THE COURT: ALL RIGHT. THANK  
YOU, GENTLEMEN."

NOTE REGARDING OPINION OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

The opinion and judgment of the United States Court of Appeal for the Ninth Circuit (Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189) is contained in the appendix to the petition for writ of certiorari at pages A-1 to A-72.

# AFFIDAVIT OF SERVICE BY MAIL

## ATTORNEY:

John K. Van de Kamp,  
Attorney General  
Michael D. Wellington,  
Deputy Attorney General

110 West "A" Street, Ste 700  
San Diego, California 92101

No. 82-1095

R. PULLEY,  
Petitioner,  
v.

ROBERT ALTON HARRIS,  
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within JOINT APPENDIX : an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Michael J. McCabe  
108 Ivy Street  
San Diego, CA 92101

County Clerk, San Diego County  
Post Office Box 128  
San Diego, CA 92112  
TO BE DELIVERED TO  
JUDGE ELI H. LEVENSON

Quin Denvir  
State Public Defender  
1390 Market St., Ste 425  
San Francisco, CA 94102  
Attn: Charles Sevilla

California Supreme Court  
350 McAllister St., Rm. 4050  
San Francisco, CA 94102

Anthony G. Amsterdam  
N.Y. Univ. Sch. Law  
40 Washington Square South  
New York, New York 10012

U.S. District Court  
Southern District  
U.S. Courthouse  
940 Front Street  
San Diego, CA 92189  
TO BE DELIVERED TO  
JUDGE ENRIGHT

Edwin L. Miller  
District Attorney  
San Diego County  
Post Office Box X-1011  
San Diego, CA 92112

U.S. Court of Appeals  
Ninth Circuit  
7th and Mission Streets  
P.O. Box 547  
San Francisco, CA 94101

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 19 day of May 1983.

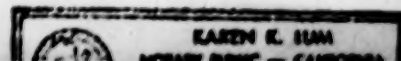
There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 19, 1983.

Clifford E. Reed, Jr.  
CLIFFORD E. REED, JR.

Subscribed and sworn to before me  
this 19 day of May 1983.



No. 82-1095

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

---

R. PULLEY, Warden of the  
California State Prison at  
San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

---

RESPONDENT'S  
BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

QUIN DENVIR  
State Public Defender  
EZRA HENDON  
Deputy State Public Defender  
MICHAEL MILLMAN  
Deputy State Public Defender  
ERIC MULTHAUP  
Deputy State Public Defender  
CHARLES M. SEVILLA  
Chief Deputy State  
Public Defender

MICHAEL J. McCABE  
Savitz & McCabe  
108 Ivy Street  
San Diego, CA 92101  
Phone: [619] 231-1181

110 West C Street  
Suite 2102  
San Diego, CA 92101  
Phone: [619] 237-6552

Attorneys for Respondent  
ROBERT ALTON HARRIS

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

---

R. PULLEY, Warden of the  
California State Prison at  
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Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

---

RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

---

The respondent, Robert Alton Harris, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 692 F.2d 1189.

The Ninth Circuit remanded respondent Harris' case to the federal district court in order that four separate claims be resolved in further proceedings. The remand requires consideration of respondent's claims of prejudicial pre-trial publicity (Appendix A, 37-38), and discriminatory infliction

of the death penalty based on race of the victim and sex of the offender (id. at 29-32), and permits the California Supreme Court "to determine if the death penalty in this case is proportionate to other sentences imposed for similar crimes" (id. at 22).

#### REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Below Does Not Raise The Question Presented by Petitioner.

Petitioner states the question presented herein as

"Whether, in addition to the procedures whereby a trial court and jury impose a death sentence, the Federal Constitution requires any specific form of 'proportionality review' by a court of statewide jurisdiction prior to the execution of a state death judgment." (Pet., p.1.)

Petitioner bases this phrasing of the question on its reading of the opinion of the Court of Appeals herein as holding "that the federal constitution precludes the execution of a state death judgment until the highest court of that state has conducted a separate and discrete 'proportionality review'. . . ." (Pet., p.18).

However, a careful analysis of the Court of Appeals opinion reveals that petitioner has misapprehended the thrust of that opinion and, based on that misapprehension, has misstated the question presented herein. As we will show, the crux of the opinion below is that it requires the California Supreme Court to undertake the proportionality review which the state court ruled was available in People v. Frierson (1979) 25 Cal.3d 142, 180, 184, and that, the proportionality review established by the latter court in Frierson was grounded in state law.

The bottom line of the Ninth Circuit opinion herein is its conclusion:

"Because the California Supreme Court did not undertake the proportionality review it announced in People v. Frierson, 25 Cal.3d at 183, and in People v. Jackson, 28 Cal.3d at 317, we vacate the district court's denial of the petition and instruct the district court to grant the petition relieving petitioner from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days from the date that this order is filed, the proportionality review." (App. A, p.71; emphasis added.)

The question then becomes the doctrinal basis of the proportionality review announced in Frierson. A review of that opinion shows that such review is grounded, at least in part, in state law, i.e., article, I, sec. 17 of the California Constitution. Thus, the Frierson court stated

"Moreover, we are now guided by well established proportionality principles of general application. In reviewing assertions that a particular sentence amounts to cruel or unusual punishment under the state Constitution (art. I, §17), we must determine whether the penalty 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (In re Lynch (1972) 8 Cal.3d 410, 424 [105 Cal. Rptr. 217, 503 P.2d 921], italics added, fn. omitted; see also People v. Wingo (1975) 14 Cal.3d 169, 182-183 [121 Cal.Rptr. 97, 534 P.2d 1001] [proportionality review on a case-by-case basis for offenses involving a wide range of conduct]; People v. Anderson, *supra*, 6 Cal.3d 628, 641-645 and cases cited [proportionality review in earlier death penalty cases].)

"In determining disproportionality under Lynch, we examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (8 Cal.3d at p.425.) In addition, we ascertain whether more serious crimes are punished in this state less severely than the offense in question. If so, 'the challenged penalty is to that extent suspect.' (Id. at p.426.) Finally, under Lynch we compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having identical or similar constitutional provisions regarding cruel and/or unusual punishment. (Id. at p.427.) Although not all of these tests of disproportionality may be appropriate in reviewing a sentence of

death in a particular case, our Lynch principles demonstrate our awareness of a constitutionally derived responsibility to assess the proportionality of a particular punishment in criminal cases generally to assure that justice is dispensed in a reasonably evenhanded manner. Such a responsibility and commitment borne in criminal cases which invoke a more modest sanction can be no less when the penalty is the most extreme. Furthermore, our performance of this function in no way interferes with the statutory sentencing powers of the trier of fact in death penalty cases." (25 Cal.3d at 183.)

Thus, while there is language in the Ninth Circuit opinion discussing proportionality review as a federal constitutional requirement, that Court did not base its decision solely on any federal constitutional ground. Rather, its decision is equally and independently grounded in California state law, specifically article 1, section 17 of the California Constitution and the Frierson decision regarding the applicability of that state constitutional section to review of death judgments.<sup>1/</sup> Indeed, petitioner admits as much:

---

1. Thus, the Ninth Circuit decision below can be viewed as simply correcting a federal due process violation by the state. Where the state creates a substantial right, such as proportionality review, the arbitrary denial of that right by the state is a federal due process violation even if the right itself is not federally guaranteed.

In Hicks v. Oklahoma (1980) 447 U.S. 343, 346, the petitioner's sentence had been affirmed by a state appellate court even though the statute, under which his sentencing jury was instructed to impose a mandatory minimum sentence, had been held unconstitutional by the state courts. This Court found a denial of due process:

"It is argued all that is involved in this case is the denial of a procedural right of exclusively state concern. Where however, a state has provided for the imposition of punishment in the discretion of a trial jury, it is not correct to say that the defendant's interest of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, (Citation) and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state. (Citations.)"



"In its opinion, the Ninth Circuit ruled that California's death penalty statute is constitutional, but that a 'proportionality review' is required both under state law, and under the federal constitution as amplified by this court's decisions in *Gregg v. Georgia* (1975) 428 U.S. 153; *Proffitt v. Florida* (1975) 428 U.S. 242; and *Jurek v. Texas* (1975) 428 U.S. 262." (Pet., p.12.)

2. Review of the Question Presented Even if Properly Before the Court, is Premature.

Petitioner urges that case-comparison (or proportionality review) is not required as a federal constitutional mandate. Respondent, however, urges that it would be premature and inappropriate for this Court to consider the issue of proportionality review at this time.

Before this Court can consider the issue of whether California's form of case-comparison review comports with federal constitutional standards, it must first have the benefit of the California Supreme Court's interpretation of the California statute. The issue is currently before that Court in *In re Jackson*, Crim No. 22165. (See concurring opinion of Justice Kaus in *People v. Easley* (1982) 33 Cal.3d 65, 93 (rehearing granted 2/23/83), noting that the issue of proportionality review is "unsettled" in that Court and is pending in *Jackson*.)

In *Zant v. Stephens* (1982) \_\_\_\_ U.S. \_\_\_\_, 72 L.Ed.2d 222, this Court declined to address constitutional issues concerning the appropriateness of Georgia's review of a death sentence because the issues were premature. The Court certified the questions back to the Georgia Supreme Court to resolve the "considerable uncertainty about the state-law premises" of its [previous] ruling." (*Id.* at 226.)

This is precisely the effect of the Ninth Circuit's

order below which permits state clarification of the proportionality question. Nothing precludes

" . . . a federal court from awaiting a state court construction of an ambiguous state statute, if there is a reasonable possibility that determination of a federal constitutional question would thereby be avoided." (Mengelkoch v. Industrial Welfare Commission (9th Cir. 1971) 442 F.2d 1119, 1125.)

Indeed, this is consistent with the time-honored rule of Ashwander v. Tennessee Valley Authority (1935) 297 U.S. 288, 346-348 (Brandeis, J., concurring), that this Court does not decide constitutional questions in advance of necessity.

Further, as noted above, the California Supreme Court has recognized its general authority to conduct proportionality review in death cases under the state constitution. Thus, another reason to await clarification by the California Supreme Court is the possibility that the proportionality review question will be decided on state grounds (e.g., People v. Krivda (1971) 5 Cal.3d 357, vacated 380 U.S. 194 (1965) opinion on remand, 9 Cal.3d 454 (1973)).

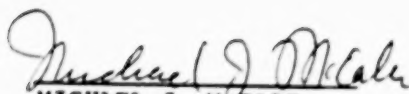
# CONCLUSION

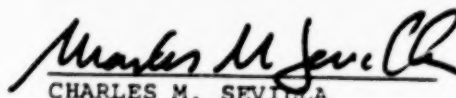
"It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case" (Burton v. United States (1905) 196 U.S. 283, 295). Since petitioner's case is being remanded for resolution of three issues other than the one question on which petitioner seeks review, there is no immediate necessity to decide the proportionality question. Any decision by this Court would be advisory in nature since petitioner's death sentence could be overturned on remand on any one of the three claims yet to be resolved in the district court. Further, in light of the ambiguity of the state court interpretation of its own statute on the proportionality question, it is entirely appropriate to await the California court's clarification of the authority for and scope of the proportionality review it will afford petition.

Therefore, the petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

QUIN DENVIR  
State Public Defender

  
MICHAEL J. McCABE  
Attorney at Law

  
CHARLES M. SEVILLA  
Chief Deputy State  
Public Defender

Attorneys for Respondent  
ROBERT ALTON HARRIS

3-14 W  
No. 82-1095

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

R. PULLEY, Warden of the  
California State Prison at  
San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS ON BRIEF IN  
OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

QUIN DENVIR  
State Public Defender  
EZRA HENDON  
Deputy State Public Defender  
MICHAEL MILLMAN  
Deputy State Public Defender  
ERIC MULTHAUP  
Deputy State Public Defender  
CHARLES M. SEVILLA  
Chief Deputy State  
Public Defender

MICHAEL J. McCABE  
Savitz & McCabe  
108 Ivy Street  
San Diego, CA 92101  
Phone: [619] 231-1181

110 West C Street  
Suite 2102  
San Diego, CA 92101  
Phone: [619] 237-6552

Attorneys for Respondent  
ROBERT ALTON HARRIS

ORIGINAL

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IN THE  
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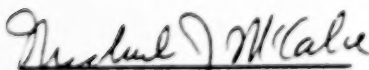
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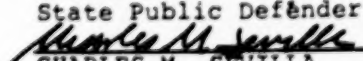
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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, the respondent, Robert Alton Harris, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of the United States, without prepayment of fees or costs and to proceed in forma pauperis.

Respondent has been indigent at all times during the proceedings against him. In both the state courts as well as in the federal courts below he has had counsel appointed to represent him.

Respectfully submitted,

  
MICHAEL J. MCCABE  
Attorney at Law

QUIN DENVIR  
State Public Defender  
  
CHARLES M. SEVILLA  
Chief Deputy State  
Public Defender

2/24/83

No. 82-1095

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term,, 1982

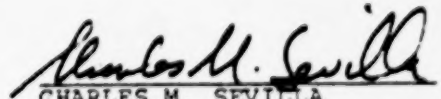
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the attached Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari by depositing the above in the United States mail, postage prepaid and properly addressed to:

JOHN VAN DE KAMP  
Attorney General's Office  
Attn: Michael Wellington  
110 West A St., Suite 700  
San Diego, CA 92101

I further certify that all parties required to be served have been served. Dated this 24th day of February, 1983 at San Diego, California.



CHARLES M. SEVILLA  
Chief Deputy State  
Public Defender

110 West C Street  
Suite 2102  
San Diego, CA 92101  
[619] 237-6552

Attorneys for Respondent  
ROBERT ALTON HARRIS

Office - Supreme Court, U.S.  
FILED

MAY 23 1983

ALEXANDER L. STEVAS,  
CLERK

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BRIEF ON THE MERITS

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JOHN K. VAN DE KAMP,  
Attorney General of the  
State of California

DANIEL J. KREMER,  
Chief Assistant Attorney  
General, Criminal Division

STEVEN V. ADLER,  
Deputy Attorney General

MICHAEL D. WELLINGTON,  
Deputy Attorney General

Attorneys for Petitioner

---

PETITION FOR CERTIORARI FILED DEC. 29, 1982  
CERTIORARI GRANTED MARCH 21, 1983

QUESTIONS PRESENTED

1. Whether, in addition to the procedures whereby a trial court and jury impose a death sentence, the Federal Constitution requires any specific form of "proportionality review" by a court of statewide jurisdiction prior to the execution of a state death judgment.

2. If so, what is the constitutionally required focus, scope, and procedural structure of such a review.



	<u>Pages</u>
OPINION BELOW	1 - 2
JURISDICTION	2 - 3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3 - 4
STATEMENT OF THE CASE	4 - 8
STATEMENT OF FACTS	8 - 11
SUMMARY OF ARGUMENT	11 - 14
ARGUMENT	15 - 53
I    INTRODUCTION - "PROPOR- TIONALITY REVIEW," THE AMORPHOUS ISSUE	15 - 21
II   "PROPORTIONALITY REVIEW" IS NOT REQUIRED BY ANY EXISTING CASE LAW	21 - 29
A.   California Cases Provide No Basis For the Ninth Circuit's Ruling	22 - 23
B.   The Decisions of This Court Do Not Establish the Requirement of "Proportionality Review"	24 - 29

TOPICAL INDEX

	<u>Pages</u>
III THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION SHOULD NOT BE READ TO REQUIRE THE SORT OF "PROPORTIONALITY REVIEW" ENVISIONED BY THE NINTH CIRCUIT	29 - 53
CONCLUSION	54
Appendix A	

TABLE OF AUTHORITIES CITED

CASES	<u>Pages</u>
Fay v. Noia (1963) 372 U.S. 391	38
Furman v. Georgia (1972) 408 U.S. 238	30 et passim
Gregg v. Georgia (1976) 428 U.S. 153	17 et passim
Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189	19, 22, 36, 39
Jones v. Estelle (5th Cir. 1980) 622 F.2d 124	23
Jurek v. State (Tex. 1975) 522 S.W.2d 934	27
Jurek v. Texas (1976) 428 U.S. 262	24, 28, 29
People v. Frierson (1979) 25 Cal.3d 142	22
People v. Jackson (1980) 28 Cal.3d 264	22
Proffitt v. Florida (1976) 428 U.S. 242	17 et passim
Proffitt v. State (Fla. 1975) 315 So.2d 461	27
Roberts v. Louisiana (1976) 428 U.S. 325	32, 33

TABLE OF AUTHORITIES CITED

CASES	<u>Pages</u>
Rockwell v. Superior Court (1976) 18 Cal.3d 420	22
Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582	21, 35, 37
Sturm v. California Adult Authority (9th Cir. 1967) 395 F.2d 446	23
Woodson v. North Carolina (1976) 428 U.S. 280	32, 33, 40
CONSTITUTIONS	
United States Constitution	
Art. I, § 9(2)	38
STATUTES	
California Evidence Code	
§ 452, subd. (d)	43
§ 459, subd. (a)	43
California Penal Code	
§ 1473, subd. (a)	41
§ 1473, subd. (d)	41
§ 1484	43

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BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, vacating the District Court's dismissal of Harris' petition for writ of habeas corpus (Harris v. Pulley, No. 82-5246 filed Sept. 16, 1982) appears as Appendix A to the petition for certiorari.

A copy of the Ninth Circuit's order denying the petitions for rehearing and rejecting the suggestion for rehearing en banc, and modifying the original opinion appears as Appendix B to the petition for certiorari. A copy of the order of the United States District Court for the Southern District of California appears as Appendix C to the petition for certiorari.<sup>1/</sup>

#### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 16, 1982. A timely petition for rehearing, with

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1. At the suggestion of the Clerk of this Court, at the same time as the filing of the petition for certiorari we lodged with this Court ten copies of the opinion of the California Supreme Court affirming both the conviction and the judgment of death. This opinion, on direct appeal, was filed February 11, 1981, and is reported at 28 Cal.3d 935.

suggestion for rehearing en banc, was denied November 15, 1982. The petition for certiorari was filed within 60 days of that date and was therefore timely. Certiorari was granted March 21, 1983. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

1. United States Constitution, Article I, section 9(2), Amendments Five, Eight and Fourteen.

2. California Constitution, Article I, section 17.

3. California Penal Code sections 1239, subdivision (b), 1473, subdivisions (a) and (d), 1484.

4. California Evidence Code sections 452, subdivision (d), 459, subdivision (a).

The text of Amendments Five, Eight and Fourteen of the United States California and Article I, section 17 to the California Constitution is set forth in Appendix D to the petition for certiorari. The text of the remaining constitutional and statutory provisions is set forth in Appendix A to this brief.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County, California, Robert Alton Harris was charged with the kidnap, robbery, and murder of John Mayeski and Michael Baker. Harris was further charged with receiving stolen property, and being a convicted felon in possession of a concealable firearm. It was additionally alleged that Harris had served a prior prison term for voluntary manslaughter, and that he was armed with and did personally use



a firearm during the kidnap, robbery and murder of the two boys. Finally, with respect to each of the two counts of murder special circumstances were alleged which qualified Harris for the death penalty. As to each murder it was alleged that the murder was committed during the commission of a robbery. It was also alleged that each murder was committed during the commission of a kidnap for the purpose of robbery. It was also alleged as to each murder that Harris was guilty of more than one murder.

Harris' trial began November 30, 1978, and on January 23 and 24, 1979, the jury found him guilty of all counts, found to be true the allegations of a prior prison term and arming and use of firearms, found the two murders to be in the first degree, and found the special

circumstances alleged with regard to the murders to be true.

A penalty phase began January 29, 1979, and on February 8, 1979, the jury declared the penalty for each count of murder to be death. A motion for new trial was denied and a judgment of death was signed on March 6, 1979.

An automatic appeal from the judgment of death was taken to the California Supreme Court which, on February 11, 1981, affirmed the conviction and the judgment of death.

Harris pursued state habeas corpus through all three levels of California state courts, with his petition being denied by the California Supreme Court on January 13, 1982.

On March 5, 1982, (eleven days prior to his scheduled execution) Harris filed a 133 page petition for habeas

corpus in the United States District Court for the Southern District of California. Following a hearing held March 12, 1982, the District Court found Harris' contentions to be legally without merit and dismissed the petition, granting a certificate of probable cause. On that same day the United States Court of Appeals for the Ninth Circuit, in a telephonic hearing, granted a stay of execution pending an expedited appeal to that court.

Briefs were filed on an expedited schedule in the Court of Appeals and, on May 11, 1982, oral argument was held in San Francisco. On September 16, 1982, the Court of Appeals issued its opinion vacating the District Court's dismissal of Harris' petition with instructions that the writ should be granted unless the California Supreme

Court holds a "proportionality review" within 120 days of the filing of the opinion. Our petition for rehearing and suggestion for rehearing en banc were denied November 15, 1982, in an order which also modified the opinion. On November 29, 1982, a stay of the mandate was granted to December 30, 1982.

Our petition for writ of certiorari was filed December 29, 1982, and was granted March 21, 1983.

#### STATEMENT OF FACTS

The facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal. (People v. Harris (1981) 28 Cal.3d 935, 943-948.) Although these facts are not crucial to the determination of the issue presented in this petition, the following brief summary of Harris' crimes is offered to demonstrate the

context in which the issue of proportionality review is presented.

In July of 1978 appellant had been on parole for six months from a previous homicide conviction when he and his younger brother decided to rob a bank in Mira Mesa, a suburb of San Diego. Just prior to committing the robbery Harris decided against using his own vehicle as a get-away car and, on the spur of the moment, decided to steal a car for that purpose. In the parking lot of a Jack-in-the-Box hamburger stand, across the street from the bank, he confronted John Mayeski and Michael Baker, two sixteen-year-old friends who were eating hamburgers in Mayeski's car prior to embarking on a day's fishing.

At gunpoint Harris kidnapped the two boys and drove them to a secluded area by a nearby lake where he executed

them, shooting one boy in the back and chasing the other screaming youth into the brush where he too was shot to death. Harris then returned to the first youth where he took special relish in firing a final and unnecessary bullet into that boy's head just to see what the effect would be like. Harris then ate the breakfast of hamburgers which the dead boys had left, laughing at his younger brother for not having the stomach to do the same. Using the boys' car, Harris completed the bank robbery, but was followed by customers of the bank to the home in Mira Mesa where he had been staying. He was promptly apprehended.

Harris confessed six times before trial and once again during the penalty phase. The sixth and seventh confessions were interrupted by his testimony during the guilt phase where he

denied killing the boys and blamed his younger brother for it. In the penalty phase it was also shown that while in jail awaiting trial Harris sodomized and threatened to kill a fellow inmate and was twice caught in possession of deadly weapons, first a knife, then a wire garrote. He also staged a sham suicide attempt, cutting his forearm and mixing the blood with a large amount of water to provide the necessary melodrama.

#### SUMMARY OF ARGUMENT

This issue arises in something of a vacuum since nowhere in the five year history of this case has anyone clearly defined what "proportionality review" is, or why it is constitutionally required. The Ninth Circuit assumes it is a comparison of each death judgment against all other capitally charged crimes in the state to avoid arbitrariness;

that it must be done by the State's highest court in every case; that it must result in a reported fact finding; and that it is required by this Court's decision in Gregg v. Georgia (1975) 428 U.S. 155, and Proffitt v. Florida (1975) 428 U.S. 242.

Such "proportionality review" is not required by Gregg or Proffitt. In Gregg this Court ruled the constitution requires the sentencing authority be given discretion which is adequately guided and fully informed. The approved Georgia statute fortuitously contained a provision for "proportionality review." In Proffitt the Florida system was approved without such a provision although the Florida Supreme Court has assumed the power to conduct such a review when necessary. In Jurek v. Texas (1975) 428 U.S. 262 the Texas system was



approved without a hint of "proportionality review" in either the statutory or case law.

The Eighth Amendment should not be read to require such a review. This Court's primary concern over capital punishment, as expressed in Furman v. Georgia (1972) 408 U.S. 238, is that it not be applied arbitrarily and capriciously. A system crafted along the lines suggested in Gregg is presumptively free of arbitrariness and caprice. The call for "proportionality review" is based on the assumption that the presumptively valid system will fail, and a secondary back-up system is also constitutionally required. Such a special additional safeguard is unnecessary.

Federal habeas corpus, already secured by the federal Constitution, serves this purpose as it has for 200 years.

Furthermore, California provides an automatic appeal to the State Supreme Court where such issues can be addressed and also allows state habeas corpus in all three levels of California courts. This is enough. The facts of this case are particularly appalling and render any possible argument of disproportionality an absurdity.

The Federal Constitution has not been read to require the states to provide any appeal from a criminal sentence. Certainly where California has provided so much review, it should be allowed to refuse Harris an additional "proportionality review."

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ARGUMENT

I

INTRODUCTION -  
"PROPORTIONALITY  
REVIEW," THE  
AMORPHOUS ISSUE

Superficially, the issue presented in this case is simple and straightforward. Does the Federal Constitution require a mandatory "proportionality review" prior to the execution of any state death judgment? Throughout the almost five-year history of this case the term "proportionality review" has been used as though it were a term of art conjuring up a readily understandable and generally accepted set of principles and procedures. Nothing could be further from the truth. The singular and impressive fact is that this issue has proceeded through all available courts (some of them two and three times) and has finally been

accepted by this Court without any court or counsel developing a clearly defined picture of what "proportionality review" actually is, or offering any legal analysis of why our Federal Constitution should require such a procedure, whatever it is.

Up to and including the argument of this case before the United States Court of Appeals for the Ninth Circuit Harris has presented "proportionality review" as but one of several procedural mechanisms available to the state in creating a constitutionally adequate death penalty system. California's system has, up until now, been attacked by Harris for not having enough of these available mechanisms. As the California State Public Defender put it in his argument on this point before the Ninth Circuit, "Petitioner does not argue with

the position that no single protective device standing by itself makes the difference between constitutionality and unconstitutionality." (Brief of Amicus Curiae, p. 39; see also Brief for Appellant Before the Ninth Circuit, p. 63.)

The Ninth Circuit did not clarify the matter when it summarily concluded that the California Supreme Court had promised a "proportionality review," and that one was required under this Court's decisions in Gregg v. Georgia (1976) 428 U.S. 153, and Proffitt v. Florida (1976) 428 U.S. 242. The Ninth Circuit pointed to no language in those cases which supported its conclusion, nor did it offer any theoretical analysis why the Federal Constitution should be read to contain such a requirement. What the Ninth Circuit did do, by unexplained

judicial fiat, was to elevate "proportionality review" to the status of a constitutional sine qua non to the execution of a state death judgment.

Furthermore, neither Harris nor the Court of Appeals have taken a solid position on exactly what "proportionality review" is. In his petition for writ of habeas corpus before the California Supreme Court Harris defined "true proportionality review" as a "comparison of all cases in which the death penalty was and could have been imposed . . . ." (Petn. for Writ of Habeas Corpus, p. 119, excerpt of clerk's record before the United States Court of Appeals for the Ninth Circuit, Exh. A.) The Ninth Circuit merely referred to it as an inquiry, "whether the penalty in the case was proportionate to other sentences imposed for similar crimes." The Ninth

Circuit also opined that "proportionality review" was, "intended to prevent the arbitrary and capricious application of the penalty . . . ." (Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189, 1196.)

We are thus in the anomalous posture of presenting the argument against "proportionality review" without the benefit of anyone ever having taken a solid position as to what it is and why it is required. So that we may have something to talk about we will proceed from the assumption that "proportionality review," as it is urged in this case, is a mandatory, on the record, factually oriented comparative analysis to be conducted by the state's highest court in every death penalty case. We will also assume that the scope of such a review would require that all of the factors relevant to the death judgment in each

case be compared to all of the relevant factors in every other case in the state where a jury was given the choice of life or death. The assumptive object of such an exhausting inquiry would be a determination whether the death judgment being reviewed is out of line with judgments handed down by juries in other similar cases.

Thus, the actual issue before this Court is whether fundamental American notions of justice and human dignity embodied in the Eighth and Fourteenth Amendments to the Federal Constitution require the highest court of each state to conduct what amounts to a separate "trial" following each death judgment in which that judgment would have to be compared to an ever-growing "universe," and make a factual determination which of the other cases the present one is "similar"



to, followed by a determination of whether the "similar" cases have yielded constitutionally "similar" results.

In terms of its impact on the judiciary, the proposal is staggering. (See Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582, 604-605, 613-614.) As we shall demonstrate, neither existing case law, nor a consideration of relevant constitutional principles requires it.

## II

### "PROPORTIONALITY REVIEW" IS NOT REQUIRED BY ANY EXISTING CASE LAW

The Ninth Circuit's conclusion that "proportionality review" is required was based on two unsupported and incorrect legal assumptions. First, the Court of Appeal assumed that the California Supreme Court had promised to conduct such a review in each case. Second, it assumed that this Court's decisions in Gregg v.

Georgia, supra, 428 U.S. 153, and Proffitt v. Florida, supra, 428 U.S. 242, required such a review. (Harris v. Pulley, supra, 692 F.2d 1189, 1196.) We shall address these separately.

A. California Cases Provide  
No Basis For the Ninth  
Circuit's Ruling

The Ninth Circuit's conclusion that the California Supreme Court had assumed the obligation of conducting "proportionality review' can be dealt with quickly. In both Rockwell v. Superior Court (1976) 18 Cal.3d 420, 432, and People v. Frierson (1979) 25 Cal.3d 142, 181, the California Supreme Court expressed, "Our own doubt that proportionality review was deemed essential by a majority of the justices in Gregg . . . ." In People v. Frierson, supra, and People v. Jackson (1980) 28 Cal.3d 264, 317, the California Supreme Court made reference

to its power to conduct such a review under the cruel and unusual punishment provisions of the California State Constitution. However, the court certainly did not assume a mandatory obligation to conduct any form of "proportionality review."

Thus, the California Supreme Court's declaration of its power to conduct a proportionality review under the authority of the California State Constitution simply does not support the Ninth Circuit's conclusion, and, in any event presents no federal issue. (Jones v. Estelle (5th Cir. 1980) 622 F.2d 124, 126; Sturm v. California Adult Authority (9th Cir. 1967) 395 F.2d 446, 448.)

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B. The Decisions of This Court Do Not Establish the Requirement of "Proportionality Review"

The Ninth Circuit's reliance on this Court's decisions in Gregg v. Georgia, supra, 428 U.S. 153, and Proffitt v. Florida, supra, 428 U.S. 242, are equally unavailing. In those cases, as well as Jurek v. Texas (1976) 428 U.S. 262, this Court examined and upheld the constitutionality of death penalty statutory schemes in Georgia, Florida, and Texas. In all three cases this Court concluded that the statutory scheme surrounding the imposition of the death penalty in those states insured that the sentencing authorities there would be provided with adequate information and sufficient guidance to guard against the arbitrary and capricious application of the death penalty.

However, in Gregg this Court noted that the Georgia statute has, "an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group . . . ." (Gregg v. Georgia, supra, 428 U.S. at p. 204.) This provision is the statutory "proportionality review," and every reference to it by this Court makes it apparent that it was seen as merely frosting on an already constitutional cake. Every reference to it is punctuated by the word "additional": "An important additional safeguard" (Gregg v. Georgia, supra, 428 U.S. at p. 198), "an additional provision" (Id., at p. 204), "in addition, the review function of the Supreme Court of Georgia affords additional assurance . . . ." (Id. at p. 207.)

Furthermore, in Proffitt this Court noted that the Florida statute

contained no such "proportionality review" provision. However, the statute did provide for an automatic review by the state supreme court, which court,

"considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under the similar circumstances in another case . . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' State v. Dixon 283 So.2d 1, 10 (1973)." (Proffitt v. Florida, supra, 428 U.S. at p. 271, emphasis added.)

Thus, in Florida although there is no statutory or case law requirement that a "proportionality review" be conducted in each case, the state supreme court has declared that it has the power to provide such a review in an appropriate case. It is significant to note that in deciding the Proffitt case, the

Florida Supreme Court made no mention whatsoever of "proportionality review", and there is no indication that any specific review was done at the state level in that case. (Proffitt v. State (Fla. 1975) 315 So.2d 461.)

In Jurek, the Texas statute provided for no "proportionality review" whatsoever, and there is no indication that the Texas Court of Criminal Appeals considered such a review its responsibility. Specifically, a reading of the Jurek case as it was decided by the Texas Court of Criminal Appeals reveals that no consideration whatsoever was given to any form of "proportionality review ." (Jurek v. State (Tex. 1975) 522 S.W.2d 934.) Rather, the Texas scheme was approved by this Court with no more showing than that, "by providing a prompt judicial review of the jury's decision in a court

with statewide jurisdiction, Texas has provided a means to promote the even-ended rational, and consistent imposition of death sentences under law." (Jurek v. Texas, supra, 428 U.S. at p. 276.)

It seems clear from a reading of Gregg and Proffitt that "proportionality review" as it exists in those states was not deemed by this Court to be an essential element to the constitutional validity of their death sentence schemes. This conclusion is made virtually inescapable, however, by a reading of this Court's opinion in Jurek. As this Court discussed the Texas scheme no mention whatsoever was made of "proportionality review". It is apparent that none exists in Texas, and it is apparent from this Court's opinion in Jurek that its absence in no way lessened the constitutional validity of that state's system.



Therefore, the Ninth Circuit's summary conclusion that this Court has ordered "proportionality review" is simply unsupported. To the contrary, this Court's decisions in Proffitt and Jurek would seem to be direct authority against the requirement of such "proportionality review."

### III

THE EIGHTH AMENDMENT TO  
THE FEDERAL CONSTITUTION  
SHOULD NOT BE READ TO  
REQUIRE THE SORT OF  
"PROPORTIONALITY REVIEW"  
ENVISIONED BY THE NINTH  
CIRCUIT

The real question presented in this case is not so much whether Gregg, Proffitt, and Jurek command "proportionality review" but rather whether the Eighth Amendment to the Federal Constitution should be read to compel such a review. The best way to examine this question is to look at the concerns this

Court has expressed about the constitutionality of capital punishment in its recent decisions and determine whether "proportionality review" is an indispensable necessity in meeting those concerns.

After a period of centuries marked by an assumption of the constitutional validity of capital punishment, this Court faced the issue directly in Furman v. Georgia (1972) 408 U.S. 238. In that case the nine justices of this Court expressed nine different opinions on the issue, five of which agreed that the death penalty system in Georgia at that time was unconstitutional. The opinions of Justices Brennan and Marshall were that capital punishment is under all circumstances unconstitutional. Thus, their opinions shed little light on how the states might constitutionally craft

a capital sentencing system. However, the opinions of Justices Douglas, White, and Stewart did not rule out the possibility of a constitutional death penalty. Although these three opinions expressed their concern in different ways, they all boiled down to a conviction that giving juries complete unfettered discretion in imposing the death penalty resulted in executions which were so rare and erratic as to be arbitrary and capricious, allowing for or even encouraging discrimination. Thus, the major concern evidenced in Furman is that the death penalty, if it is to be imposed, not be imposed in an arbitrary fashion, that there be some rational distinction between those who live and those who die. The clearest result of Furman was that absolute sentencing discretion was no longer constitutionally permissible.

The nine separate opinions in Furman caused some confusion among the states and, in 1976, this Court decided a new series of cases led by Gregg v. Georgia, supra, 428 U.S. 153. In Gregg and its companions this Court reaffirmed the concerns of Furman that the death penalty not be inflicted arbitrarily and capriciously. However, Gregg and its companions went a step further than Furman. Where Furman had merely decried the fact that state death penalty systems produced unconstitutionally arbitrary results, the series of cases led by Gregg revealed the constitutionally required "bones" of a valid death penalty system.

In Woodson v. North Carolina (1976) 428 U.S. 280, and Roberts v. Louisiana (1976) 428 U.S. 325, it was made clear that some discretion on the part of the sentencing authority is

constitutionally required, "to maintain a link between contemporary community values and the penal system" (Woodson v. North Carolina, supra, 428 U.S. at p. 295, quoting Witherspoon v. Illinois (1968) 291 U.S 510) and to provide the sentencing authority with an opportunity to consider the unique circumstances of each criminal and crime. (Woodson v. North Carolina, supra, at p. 304.) Thus, in Woodson and Roberts this Court concluded that mandatory capital punishment systems were constitutionally impermissible.

In the Gregg decision it was fuurther made clear that, in exercising the sentencing decision, the sentencing authority must be given, "accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence . . ." and that the sentencing authority must be given,

"guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Gregg v. Georgia,, supra, 428 U.S. at pp. 190, 192.)

Thus, while Furman expressed the basic constitutional concern that the death penalty not be inflicted in an arbitrary and capricious manner, the series of cases led by Gregg established the constitutionally compelled elements necessary to safeguard against the concerns voiced in Furman. It is important to note that this Court did not rule any specific procedures to be constitutionally mandated. Rather, it was held that a system which insured informed, guided sentencing discretion would satisfy Furman's concerns.

"In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, 428 U.S. at p. 195.)

While the death penalty system examined by this Court in Furman was found to be presumptively arbitrary and capricious, a system set up along the guidelines revealed in Gregg can be seen as presumptively valid. (See, e.g. Spinkellink v. Wainwright, supra, 578 F.2d at pp. 605-606, 613-614.) California's death penalty system is based on the elements set out in Gregg.

It involves a bifurcated trial featuring a separate sentencing phase during which the jury is given complete and accurate sentencing information and its discretion is guided by specifically enumerated factors. (Harris v. Pulley, supra, 692 F.2d 1189, 1193.) Three times since his judgment of death Harris has asked this Court to grant certiorari based on his claim that the California statutory scheme does not satisfy the demands of Furman and Gregg. All three times this Court has refused to hear his claims. We submit that the California death penalty system meets the Gregg standards, and satisfies the concerns expressed in Furman. This system is presumptively valid. The death judgments it produces are presumptively free of arbitrariness and caprice.

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(Spinkellink v. Wainwright, supra, 578 F.2d at pp. 604-605, 613-614), cert. denied, 440 U.S. 976 (1979).)

The real thrust of the call for "proportionality review" has nothing whatsoever to do with the presumptive validity of the statutory systems by which state juries hand down death sentences. Rather, it is based in the assumption that a presumptively valid system will necessarily fail in checking arbitrariness and that a "safety net" is needed to back up the trial system. Certainly we would agree that there is always the possibility that a presumptively valid system could yield an impermissibly arbitrary result in a given case. However, this problem is hardly a new one and there is no necessity for this Court to establish a separate (much less mandatory) procedure

to safeguard against the possibility of an occasional impermissible result.

The Federal Constitution itself expressly provides such a "safety net" by securing the historical right of English speaking people to petition for a writ of habeas corpus. (U.S. Const., Art. I, § 9(2); see also Fay v. Noia (1963) 372 U.S. 391.) Federal habeas corpus has been the historic refuge of the state prisoner who claims to have been unfairly treated by an otherwise proper state system. Mr. Harris knows this well and has used federal habeas corpus to his advantage in this case. Harris filed a petition for writ of habeas corpus in the United States District Court for the Southern District of California specifically alleging that the death penalty had been arbitrarily and capriciously applied to him. (See excerpt of Clerk's record

from the U.S. District Court for the Ninth Circuit, exhibit A, pp. 5-10.) Furthermore, the Ninth Circuit even ruled in Harris' favor to the extent that it ordered the District Court to look more closely at Harris' claims that the California system discriminated against him because his victims were white (although he too is white) and because he is male. (Harris v. Pulley, supra, 692 F.2d at p. 1197-1198.)

Thus the Federal Constitution already provides a procedural safeguard against the possibility of a presumptively valid state system yielding an impermissible result. No new procedure is necessary and it would be wasteful in the extreme to require the enormously burdensome factual review envisioned by the Ninth Circuit in every death penalty case just because of the hypothetical

possibility of an occasionally disproportionate result. We submit that under the Federal Constitution the states are obliged only to devise death penalty schemes which are presumptively free of arbitrariness. The states are not constitutionally required to further back up that presumptively valid system with a complex and burdensome system of mandatory reviews.<sup>2/</sup>

Even if this Court were to decide that the states have some obligation to provide a review of the arbitrariness of a death sentencing decision, it is far too much to require that one as burdensome as that described by the Ninth Circuit be conducted mandatorily and on

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2. "it is established, of course, that there is no right to appellate review of a criminal sentence. McKane v. Durston, 153 U.S. 684 (1894)." (Woodson v. North Carolina, supra, 428 U.S. at p. 316 (dis. opn. of Rehnquist, J.).)

the record in every case regardless of the merits of the case.

Although we urge that the constitution does not require any such review, the California Legislature has obviously concluded that it is desireable to give criminal defendants an opportunity to appeal their convictions and raise any questions concerning the legality of their treatment. Not only has the California Legislature required that each death judgment be automatically appealed to the California Supreme Court (Cal. Pen. Code, § 1239, subd. (b)), it has also provided that criminal convictions may be reviewed in the state courts on a petition for writ of habeas corpus (Cal. Pen. Code, § 1473, subd. (a) and (d).) Harris has availed himself of both these procedures.

Whatever may have been the case in the past, this Court in both Furman and Gregg has conclusively established the death penalty cannot be imposed in an arbitrary or capricious fashion. Thus, if the California death penalty system, notwithstanding its carefully drawn safeguards, imposes a death penalty upon a defendant arbitrarily and capriciously this constitutional defect can be considered both on automatic appeal to the California Supreme Court and on a petition for writ of habeas corpus in the state courts. Any such claim can be considered by these procedures with no less efficacy than it could be on any proposed proportionality review.

On mandatory appeal to the California Supreme Court that court has access to the entire trial record, and as a further matter is statutorily empowered

to take judicial notice of the records of any other court in the state. (Cal. Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Furthermore, the state habeas corpus procedure allows for a full evidentiary hearing if the judge issuing the writ is of the opinion a prima facie case has been established. (Cal. Pen. Code, § 1484.)

It is because Harris has already had so many opportunities to present any claim that the death penalty has been imposed arbitrarily or discriminatorily as to him, that we have repeatedly said that he has had whatever "proportionality review" may be deemed necessary. The fact that the California Supreme Court summarily denied his petition for writ of habeas corpus on this ground is not proof that he has been denied review, rather it

indicates that there was not enough substance to his claim to warrant a fuller factual hearing.

As can be seen, this Court is not actually called upon to rule whether the constitution requires state appellate review of the sentencing decision, since California has provided ample opportunities for death sentence defendants to raise these issues. The actual issue in this case is whether, in addition to an automatic appeal to the California Supreme Court and the availability of the habeas corpus at three levels of California courts (not to mention habeas corpus in the federal courts), every death sentenced defendant has a constitutional right to a complete separate factual determination by the state's highest court on the issue of whether his judgment is arbitrary or



capricious, irrespective of his ability to make a prima facie showing that it is.

The federal constitution does not require such wastefulness. It proscribes arbitrary infliction of the death penalty and, therefore, requires guided informed sentencing direction. California provides that and much more. We do not come into this Court championing arbitrary death judgments, nor do we urge that a hypothetically arbitrary judgment should be immune from state appellate review. With respect to the procedural safeguards built into the death penalty process we are simply urging, in common lay terms, that enough is enough. Most specifically we urge that it is unnecessary to force the state judiciary to conduct the sort of mandatory "proportionality review" envisioned by the Ninth Circuit in every case regardless of the merits of that case.

In fact we urge that the facts of the present case illustrate our point eloquently. Mr. Harris was only six months out on parole from a previous homicide conviction when he kidnapped two teenage boys to use their car in a bank robbery. He then coldbloodedly executed them so that they could not be witnesses against him, shooting one youth in the back and chasing the other screaming youth into the underbrush where he too was executed. Mr. Harris then sat down and ate the boys' unfinished hamburgers, laughing at his younger brother for not being able to do the same. While in jail awaiting trial Harris threatened and sodomized a fellow inmate and was twice caught making deadly weapons. He confessed several times to the murders.

Now Robert Harris claims that he was sentenced to death not because of

his deeds, but because his victims were white (though he too is white) and because he is male. Robert Harris will ask this Court to rule that the United States Constitution demands that the California Supreme Court compare his case to all other "similar" cases (if indeed any other similar cases can be found) and make an on-the-record factual determination whether the death penalty is disproportionate as applied to him.

We submit that there is simply no credible argument that the death penalty is disproportionate as to Robert Harris, and that if the facts of his case do not justify the death penalty, no case will. These facts demonstrate the wisdom of allowing the state courts to refuse defendants such as Mr. Harris a full blown evidentiary hearing on such patently absurd claims.

Robert Harris has been tried, convicted, and condemned under a presumptively valid capital punishment system. He had an automatic appeal to the California Supreme Court which exhaustively considered all his claims. He has pursued two separate writs of habeas corpus, each one through all three levels of the California state courts. He pursued federal habeas corpus in the federal district court and enjoyed a full and complete appeal from the denial of that petition. He has on three separate occasions petitioned to this Court for certiorari. Robert Harris has pressed his claims on 13 separate occasions in 6 separate courts for a period of almost five years. He asks for yet another hearing. His case typifies the longevity and redundancy of capital litigation. We

submit that Mr. Harris has had all the process he is due.

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Without the benefit of having before us a coherent argument why the constitution should require a proportionality review, or even a clear statement as to what such a review is, we have attempted to demonstrate that California's death penalty system is presumptively fair, and provides more than ample opportunity for appellate review of any issue which might arise. We think it is demonstrated that a "proportionality review" as envisioned by the Ninth Circuit is not necessary to meet the concerns expressed by this Court in Furman v. Georgia, supra 408 U.S. 238. To the contrary, if we are to give full consideration to the question, "proportionality review" is better

suited to obstruct the fair and appropriate implementation of the death penalty than it is to ensure it.

The question of the wisdom of capital punishment is one that gives rise to strongly held feelings and commitments on both sides. Through the decisions of this Court in Gregg and its companion cases, the abstract constitutionality of the death penalty is secure, and it is now the law of the land in the overwhelming majority of the states. This fact, however, does not make it any more warmly accepted by its detractors. It can be expected that strongly held feelings against the death penalty will encourage some to argue in favor of onerous procedural requirements at least in part in an effort to make the implementation of the death penalty so crushingly expensive and burdensome a state will be

disuaded from using it in appropriate cases and perhaps may abandon it altogether.

One leading opponent to the death penalty, who has argued several such cases before this Court, gave the following advice to defense attorneys in capital cases:

" . . . prosecutors and courts have got to be made to pay the price for prosecuting cases capitally. If life is going to be taken, if a prosecution is going to be undertaken which threatens somebody's client with death, the defense has to make it very, very clear that it is not going to be easy, that there's going to be no accomodation, that every issue that can be fought will be fought to the end - that there is no such thing as a line of least resistance or a line of slight cost when it comes to prosecuting death cases. Before a prosecutor decides to paper a case as a

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death case, he damn well better make up his mind in this post-Jarvis/Gann era that it's worth it."<sup>3</sup>

We would submit that this is not the proper approach to use in deciding what procedures are required in capital cases. Capital punishment is now the constitutionally permitted law of the land. It is important for the courts in deciding issues such as the present one, to approach these questions not with grudging resignation, but with a sense of cooperation with the American people from whom the courts derive their power, and whose deeply felt needs and desires are expressed overwhelmingly in the popular national support for capital punishment.

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3. Interview with Anthony Amsterdam in California Attorneys for Criminal Justice, Forum, Sept./Oct. 1978, p. 60.



Although Americans have always nourished a certain distaste for the slowness and expense with which their government moves, recent years have witnessed a particular heightening and sharpening of that distrust and resentment as they have repeatedly tried to protect themselves from violent crime through the passage of capital punishment laws.

It is imperative in cases such as the present one that we avoid any temptation to make the State "pay the price" as a way to discourage its implementation of a proper punishment.

This nation has spent a decade in debate, carefully examining our fundamental national commitment to the death penalty. The debate has been healthy, and has renewed our national sense of purpose and direction. The debate is over. It is time to get on with it.

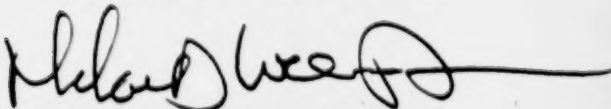
CONCLUSION

For the foregoing reasons  
petitioner respectfully requests that  
the judgment of the United States Court  
of Appeals for the Ninth Circuit be  
reversed.

JOHN K. VAN DE KAMP,  
Attorney General of the  
State of California

DANIEL J. KREMER,  
Chief Assistant Attorney  
General, Criminal Division

STEVEN V. ADLER,  
Deputy Attorney General

A handwritten signature in black ink, appearing to read "Michael D. Wellington", with a long horizontal flourish extending to the right.

MICHAEL D. WELLINGTON,  
Deputy Attorney General

Attorneys for Petitioner

Appendix A

UNITED STATES CONSTITUTION

Section 9.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

CALIFORNIA STATUTES

Evidence Code

§ 452

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

. . . . .

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

§ 459

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a

A-3

tenor different from that noticed by the  
trial court.

Penal Code

§ 1239

Text of section operative until  
January 1, 1989.

. . . . .

(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel. The defendant's trial counsel, whether retained by the defendant or court-appointed, shall continue to represent the defendant until completing the additional duties set forth in paragraph (1) of subdivision (b) of Section 1240.1.

§ 1473

(a) Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire

into the cause of such imprisonment or restraint.

. . . . .

(d) Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

§ 1484

Proceedings on the hearing.

The party brought before the Court or Judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge.

The Court or Judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment

or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.



AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

John K. Van de Kamp,  
Attorney General  
Michael D. Wellington,  
Deputy Attorney General

110 West "A" Street, Ste 700  
San Diego, California 92101

No. 82-1095

R. PULLEY,  
Petitioner,  
v.

ROBERT ALTON HARRIS,  
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within BRIEF ON THE MERITS: an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Michael J. McCabe  
108 Ivy Street  
San Diego, CA 92101

County Clerk, San Diego County  
Post Office Box 128  
San Diego, CA 92112  
TO BE DELIVERED TO  
JUDGE ELI H. LEVENSON

Quin Denvir  
State Public Defender  
1390 Market St., Ste 425  
San Francisco, CA 94102  
Attn: Charles Sevilla

California Supreme Court  
350 McAllister St., Rm. 4050  
San Francisco, CA 94102

Anthony G. Amsterdam  
N.Y. Univ. Sch. Law  
40 Washington Square South  
New York, New York 10012

U.S. District Court  
Southern District  
U.S. Courthouse  
940 Front Street  
San Diego, CA 92189  
TO BE DELIVERED TO  
JUDGE ENRIGHT

Edwin L. Miller  
District Attorney  
San Diego County  
Post Office Box X-1011  
San Diego, CA 92112

U.S. Court of Appeals  
Ninth Circuit  
7th and Mission Streets  
P.O. Box 547  
San Francisco, CA 94101

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 19 day of May 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

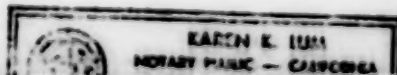
I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 19, 1983.

CLIFFORD E. REED, JR.  
CLIFFORD E. REED, JR.

Subscribed and sworn to before me  
this 19th day of May, 1983.

Karen K. Ium  
Notary Public in and for said County and State



No. 82-1095

JUL 22 1982

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. PULLEY, Warden of the California  
State Prison at San Quentin,

Petitioner,

- v. -

ROBERT ALTON HARRIS,

Respondent.

On Writ of Certiorari to the United  
States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

QUIN DENVIR

State Public Defender

CHARLES M. SEVILLA

Chief Deputy State Public Defender

EZRA HENDON

MICHAEL G. MILLMAN

ERIC S. MULTHAUP

Deputy State Public Defenders

MICHAEL J. MCCABE

110 West C Street, Suite 2102

San Diego, California 92101

(619) 237-6552

ANTHONY G. AMSTERDAM\*

New York University Law School

40 Washington Square South

New York, New York 10012

(212) 598-2638

Attorneys for Respondent

\* Counsel of record

## QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly held that the California Supreme Court must review the fitness of respondent Harris' death sentence, pursuant to principles announced by the California Court in other death cases, before Harris was executed and before his remaining constitutional challenges to his conviction and sentence were entertained on the merits in federal habeas corpus proceedings.

2. Whether the California Supreme Court's failure to review the fitness of Harris' death sentence under those principles denied him due process of law.

3. Whether that failure violated his Eighth and Fourteenth Amendment right to be protected against cruel and unusual punishment.

TABLE OF CONTENTS

	<u>Page</u>
Citations to opinions below . . . .	1
Constitutional provisions and statutes involved . . . . .	2
Statement of the case . . . . .	2
Summary of argument . . . . .	13
Argument . . . . .	17
I. Introduction: California's death-sentencing procedures . . . . .	17
A. Trial procedures . . .	18
B. Appellate procedures . .	25
II. The decision below can and should be affirmed with no need to reach the Eighth Amendment issue presented by petitioner . . . . .	42
A. The Ninth Circuit's judgment in procedural context . . . . .	46
B. Due process of law . .	56
III. The decision of the Eighth Amendment issue below should be affirmed . .	64
Conclusion . . . . .	87

	<u>Page</u>
Appendix A: Proportionality review provisions of state law . . . . .	1a
Appendix B: Multiple-murder defendants not sentenced to death . . . . .	1b
Appendix C: Excerpts from former California Penal Code §§ 190 - 190.4 . . . .	1c

# TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Arizona v. Manypenny, 451 U.S. 232 (1981).....	77
Barclay v. Florida, 51 U.S.L.W. 5206 (U.S., July 6, 1983).....	50, 70, 71
Barefoot v. Estelle, 51 U.S.L.W. 5189 (U.S., July 6, 1983).....	77
Bellotti v. Baird, 428 U.S. 132 (1976).....	78
Blair v. State, 406 So.2d 1103 (Fla. 1981).....	76
Bondholders Committee v. Commissioner, 315 U.S. 189 (1942).....	46
Burrows v. State, 640 P.2d 533 (Okla. Crim. App. 1982).....	76

<u>Cases</u>	<u>Page</u>
California v. Ramos, 51 U.S.L.W. 5220 (U.S., July 6, 1983).....	18, 71
Coleman v. State, 378 So.2d 640 (Miss. 1979).....	76
Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981).....	60
Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam) .....	51
Eddings v. Oklahoma, 455 U.S. 104 (1982).....	17, 64, 72
Engle v. Isaac, 456 U.S. 107 (1982).	77
Ex parte Royall, 117 U.S. 241 (1886).....	52, 77
Furman v. Georgia, 408 U.S. 238 (1972).....	66, 68, 71 73
Garcia v. State, 626 S.W.2d 46 (Tex. Crim. App. 1982).....	76
Gardner v. Florida, 430 U.S. 349 (1977).....	72, 73
Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977).....	75
Godfrey v. Georgia, 446 U.S. 420 (1980).....	67
Goodwin v. State, 405 So.2d 170 (Fla. 1981).....	75
Goss v. Lopez, 419 U.S. 565 (1975)..	60
Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).....	60

<u>Cases</u>	<u>Page</u>
Gregg v. Georgia, 428 U.S. 153 (1976).....	49, 50, 53, 65, 68, 69, 70, 71, 72, 85
Halliwell v. State, 323 So.2d 557 (Fla. 1975).....	75
Harris v. California, 454 U.S. 882 (1981).....	8
Harris v. California, 457 U.S. 1111 (1982) .....	9
Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982) .....	1, 10
Henry v. State, 278 Ark. 478, 647 S.W.2d 419 (1983).....	75
Hicks v. Oklahoma, 447 U.S. 343 (1980).....	61
Hopper v. Evans, 456 U.S. 605 (1982).....	71
Huffman v. Pursue, 420 U.S. 592 (1975).....	78
In re Anderson, 69 Cal.2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968). 26	
In re Foss, 10 Cal.3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) .....	32
In re Grant, 18 Cal.3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976)....	32
In re Lynch, 8 Cal.3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972)...	30, 31, 32, 33, 35, 39, 40, 59, 77

<u>Cases</u>	<u>Page</u>
In re Rodriguez, 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).....	33
Jackson v. Virginia, 443 U.S. 307 (1979).....	76, 77
Jennings v. Illinois, 342 U.S. 104 (1951).....	55
Jurek v. Texas, 428 U.S. 262 (1976).	29, 34, 6 66, 67
Kolender v. Lawson, 51 U.S.L.W. 4532 (U.S., May 2, 1983).....	46
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....	61, 62
Malloy v. State, 382 So.2d 1190 (Fla. 1979).....	75
McCaskill v. State, 344 So.2d 1276 (Fla. 1977).....	75
Minnick v. California Department of Corrections, 452 U.S. 105 (1981)..	44
Moore v. Sims, 442 U.S. 415 (1979)..	77, 78
Munn v. State, 658 P.2d 482 (Okla. Crim. App. 1983).....	76
Neary v. State, 384 So.2d 881 (Fla. 1980).....	75
Parker v. County of Los Angeles, 338 U.S. 327 (1949).....	44, 53



<u>Cases</u>	<u>Page</u>
People v. Anderson, 6 Cal.3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972).....	30, 31
People v. Carlson, 79 Ill.2d 564, 404 N.E.2d 233 (1980).....	76
People v. Easley, 33 Cal.3d 65, 654 P.2d 1272, 187 Cal. Rptr. 745 (1982).....	36, 37, 38, 39, 40, 41, 42, 45, 54, 59, 82
People v. Frierson, 25 Cal.3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).....	24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 37, 38, 39, 48, 49, 50, 51, 52, 53, 56, 58, 59, 63, 77, 82
People v. Gleckler, 82 Ill.2d 145, 411 N.E.2d 849 (1980).....	76
People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981).....	1, 3, 8, 57
People v. Herrera, 127 Cal. App.3d 590, 179 Cal. Rptr. 694 (1982)....	83

<u>Cases</u>	<u>Page</u>
People v. Jackson, 28 Cal.3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980).....	24, 32, 34 35, 36, 37 38, 39, 48 49, 50, 51 52, 53, 56 58, 59, 82
People v. Keogh, 46 Cal. App.3d 919, 120 Cal. Rptr. 817 (1975).....	33
People v. Robertson, 33 Cal.3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).....	24
People v. Vargas, 53 Cal. App.3d 516, 126 Cal. Rptr. 88 (1975).....	33
People v. Wingo, 14 Cal.3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975).....	30, 32, 33
Proffitt v. Florida, 428 U.S. 242 (1976).....	28, 34, 49 50, 53, 65 66
Provence v. State, 337 So.2d 783 (Fla. 1976).....	75
Rescue Army v. Municipal Court, 331 U.S. 549 (1947).....	43, 44
Robb v. Connolly, 111 U.S. 624 (1884).....	55
Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam).....	51

<u>Cases</u>	<u>Page</u>
[Stanislaus] Roberts v. Louisiana, 428 U.S. 325 (1976).....	18, 67, 68
Rockwell v. Superior Court, 18 Cal.3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).....	17, 18
Roney v. State, 632 S.W.2d 598 (Tex. Crim. App. 1982).....	76
Rose v. Lundy, 455 U.S. 509 (1982)..	51
Schlesinger v. Councilman, 420 U.S. 738 (1975).....	77
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).....	61
Slater v. State, 316 So.2d 539 (Fla. 1975).....	75
Smith v. Phillips, 455 U.S. 209 (1982).....	46
State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).....	75
State v. Graham, _____ Ariz._____, 660 P.2d 460 (1983).....	75
State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982).....	76
State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982).....	75
Steffel v. Thompson, 415 U.S. 452 (1974).....	55

<u>Cases</u>	<u>Page</u>
Street v. New York, 394 U.S. 576 (1969).....	46
Sumlin v. State, 273 Ark. 185, 617 S.W.2d 372 (1981).....	75
Swan v. State, 322 So.2d 485 (Fla. 1975).....	75
Trainor v. Hernandez, 431 U.S. 434 (1977).....	77
United States v. American Railway Express Co., 265 U.S. 425 (1924)..	46
United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)..	62
Vitek v. Jones, 445 U.S. 480 (1980).	60
Wallace v. State, 618 S.W.2d 67 (Tex. Crim. App. 1981).....	76
Wolff v. McDonnell, 418 U.S. 539 (1974).....	61
Woodson v. North Carolina, 428 U.S. 280 (1976).....	18, 66, 6
Yick Wo v. Hopkins, 118 U.S. 356 (1886).....	61
Young v. Ragen, 337 U.S. 235 (1949).	55
Zant v. Stephens, 456 U.S. 410 (1982) (per curiam) (opinion certi- fying question) .....	67, 68
Zant v. Stephens, 51 U.S.L.W. 4891 (U.S., June 22, 1983).....	16, 22, 5 68, 69, 7 73

<u>Statutes</u>	<u>Page</u>
Cal. Civil and Criminal Court Rules 401-453.....	80
Cal. Penal Code §§ 190-190.4 .....	2
Cal. Penal Code §§ 190-190.6 .....	17
Cal. Penal Code §§ 190-190.7.....	18
Cal. Penal Code § 190.....	18
Cal. Penal Code § 190.1.....	18, 19, 20
Cal. Penal Code § 190.2.....	18, 19
Cal. Penal Code § 190.3.....	20, 21, 22, 23, 24
Cal. Penal Code § 190.4.....	19, 20, 25, 27
Cal. Penal Code § 288 .....	33
Cal. Penal Code §§ 1170-1170.8.....	80
Cal. Penal Code § 1170.....	80, 81, 82
Cal. Penal Code § 1170.3.....	81
Cal. Penal Code § 1239(b).....	26
1 Cal. Stats. 1973, ch. 719.....	17
3 Cal. Stats. 1976, ch. 1139.....	80
1 Cal. Stats. 1977, ch. 165, .....	81, 82
1 Cal. Stats. 1977, ch. 316.....	17

Other authority

Page

California Youth and Adult Correctional Agency, Board of Prison Terms, Report on Sentencing Practices -- Determinate Sentencing Law (February 10, 1983) .....	83
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BRIEF OF RESPONDENT  
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CITATIONS TO OPINIONS BELOW

The amended opinion of the Ninth Circuit is reported as Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). As originally delivered on September 16, 1982, it appears in the appendix to the petition for certiorari [hereafter, "Cert. App."] at page A-1. Amendments made on denial of rehearing, November 15, 1982, appear at Cert. App. A-67.

The United States District Court issued no written opinion. Its remarks in dismissing Harris' habeas corpus petition appear in the Joint Appendix at JA-8.

The opinions of the California Supreme Court on Harris' direct appeal are reported as People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). Neither that court nor the lower

California state courts issued any opinions when denying Harris' state postconviction petitions.

CONSTITUTIONAL PROVISIONS AND STATUTES

INVOLVED

In addition to the provisions set out by petitioner [hereafter, "Pulley"] in his brief [hereafter "Pet. Br."], portions of former California Penal Code §§ 190 - 190.4 are relevant. These appear in Appendix C infra.

- STATEMENT OF THE CASE

This case arises from a federal habeas corpus proceeding in which respondent Robert Alton Harris (hereafter, "Harris") raised a number of constitutional challenges to his convictions and death sentences by a California state court for two counts of first-degree murder committed during a robbery and kidnaping. The Ninth



Circuit below rejected some of his claims and sustained others to the extent of requiring further judicial consideration of them. Only one of its rulings in Harris' favor has been brought to this Court on certiorari. We agree with Pulley that, for present purposes, "[t]he facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal [(see People v. Harris, 28 Cal.3d 935, 943-948, 623 P.2d 240, 243-246, 171 Cal. Rptr. 679, 682-685 (1981)), and] ... are not crucial to the determination of the issue presented in this petition," Pet. Br. 8. We therefore summarize them briefly.<sup>1/</sup>

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<sup>1/</sup> All of the facts in the following five paragraphs are taken from the pages of the California Supreme Court's opinion just cited, except the facts in the sixth paragraph relating to Harris' childhood treatment by his father. These appear in the testimony of Harris' mother and sister at pages 4603-4608 and 4616-4621 of the trial transcript.

Harris and his younger brother had made extensive plans to rob a bank in Mira Mesa, California (a San Diego suburb). On the morning of the robbery, July 5, 1978, Harris decided on the spur of the moment not to use his own automobile for the get-away. He approached two teenage boys, John Mayeski and Michael Baker, who were eating hamburgers in Mayeski's car in a parking lot across the street from the bank. He displayed a handgun, got into the back seat of the Mayeski car, and apparently ordered the driver to drive to a secluded wooded area beside a nearby lake. Harris' brother followed in Harris' car.

Harris told the two boys that he was going to use their car to rob a bank, and that nobody would be hurt. They offered to wait a while and then to report the car as stolen, giving the police a mislead-

ing description of the thieves. Harris said that that was a good idea, and one of the boys moved off into the brush. Harris suddenly shot the second boy in the back, and fired another shot into him after he fell. Harris pursued the first boy and also shot him to death. He then returned and fired two more close-range shots into the body of the second boy.

Using the boys' car, Harris and his brother completed the bank robbery but were followed from the scene by a bystander who reported their whereabouts to the police. They were shortly apprehended and both confessed to the killings as well as the robbery.

Harris was subsequently charged with kidnaping, robbing and murdering the two boys, and with several related lesser offenses. The information alleged, as "special circumstances" permitting the

death penalty for each murder,<sup>2/</sup> that the murder of one boy had been perpetrated willfully, deliberately and with premeditation in the commission of a robbery and of a kidnaping for the purpose of robbery, and that Harris had also murdered the other boy. A jury in the Superior Court for San Diego County found Harris guilty of first-degree murder for both killings, and found the "special circumstances" true. These findings led to a penalty trial to determine whether Harris should be sentenced to death or to life imprisonment without possibility of parole.<sup>3/</sup>

At the penalty trial, the prosecution presented evidence that Harris had been

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<sup>2/</sup> The role of "special circumstances" under the California statute authorizing the death penalty for some first-degree murders is described at pages 18-20 infra.

<sup>3/</sup> The pertinent California capital-sentencing procedures are described at pages 18-25 infra.

convicted of voluntary manslaughter for the beating death of an acquaintance in 1975; that Harris and others had sodomized a cellmate in jail; that Harris had subsequently compelled this same cellmate to perform oral copulation on him; that Harris had verbally threatened the cellmate's life; and that Harris had been found by jail authorities in possession of a wire garrote and a shank (a jail-made knife) while awaiting trial. Harris presented evidence of his dismal childhood, including severe beatings and denials of paternity by his alcoholic father (who had been sent to prison for sexual offenses against Harris' sister), and Harris' expulsion from home at age 14 by his mother (herself an alcoholic and a convicted bank robber). The jury returned a verdict of death; the trial judge declined to modify it; and, on March 6, 1979, Harris was formally sentenced to die.

On February 11, 1981, the California Supreme Court affirmed the judgment of death. People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). Its opinion discusses numerous issues, none relating to the substantive fitness of Harris' death sentence. Certiorari was denied on October 5, 1981. Harris v. California, 454 U.S. 882 (1981)(Justices Brennan and Marshall dissenting).

On November 17, 1981, Harris filed a habeas corpus petition in the Superior Court of San Diego County, which denied the petition without an evidentiary hearing on November 24, 1981. On November 25, 1981, he filed a similar petition in the California Court of Appeal (4th District, Division One), which summarily denied it the same day. On December 7, 1981, he filed a similar petition in the California Supreme Court, which denied it without opinion on January 13, 1982. (This

Court denied certiorari on June 7, 1982. Harris v. California, 457 U.S. 1111 (1982) (Justices Brennan and Marshall dissenting).)

Harris' execution was set for March 16, 1982. On March 5, he filed the instant habeas corpus petition in the United States District Court for the Southern District of California, raising a number of federal constitutional claims. The district court read the California Supreme Court opinion on Harris' direct appeal but did not examine the state-court record (J.A. 8, 10-11); it heard oral argument but denied an evidentiary hearing (J.A. 24). On March 12, 1982, it dismissed the petition on the merits in an oral opinion (J.A. 8-25) and denied a stay of execution pending appeal (J.A. 24). The Ninth Circuit stayed Harris' execution on March 12, 1982, and ordered the appeal expedited. It heard oral argument on May

11, 1982, and issued its decision on September 16, 1982, affirming the district court on several issues and reversing it on several other issues. (Cert. App. A-1 to A-66.) That decision is described briefly in the following paragraph, and in more detail at pages 46-50 infra. Motions by both parties for rehearing and suggestions for rehearing en banc were denied on November 15, 1982, in an order amending the original opinion slightly (Cert. App. A-67 to A-72). The published version of the Ninth Circuit's opinion, Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), contains these amendments.

The Ninth Circuit rejected numerous challenges by Harris to the validity of his conviction, and to the constitutionality of the California death-penalty statute. It granted Harris limited relief on four issues. With respect to his claim



that he had been denied a fair trial by reason of extensive prejudicial pretrial publicity, the Ninth Circuit found that the district court had simply accepted the ultimate conclusion of the California Supreme Court, without reading the state-court record. It therefore remanded with directions to the district court to "examine all relevant parts of the state court record to determine whether the record supports the state court's findings," and then to make an independent determination of the ultimate constitutional question. Cert. App. A-37 to A-38; see Cert. App. A-33 to A-39. With respect to Harris' claims that the death penalty had been applied arbitrarily and discriminatorily in his case, pursuant to a death-sentencing pattern which displayed both racial and gender-based discrimination, the Ninth Circuit found that the district

court had not given Harris an opportunity to develop a record of sufficient completeness to determine whether an evidentiary hearing was required. It therefore remanded with directions to the district court to "provide an opportunity to develop the factual basis and arguments concerning [these two claims]," Cert. App. A-25. See Cert. App. A-23 to A-32. With respect to Harris' claim that he was constitutionally entitled to, and had not been given, appellate review of the proportionality of his death sentence, the Ninth Circuit found that the California Supreme Court had announced its intention to "review each death penalty ... to determine whether the penalty was being applied proportionately," Cert. App. A-20, but that it "did not undertake any proportionality review in [Harris'] ... case," Cert. App. A-21. The Ninth Circuit

accordingly required that the California Supreme Court conduct such review before the district court proceeded to a final adjudication of this and the other remanded issues. Cert. App. A-2 to A-3, A-18 to A-23, A-68, A-70 to A-71. Pulley's petition for certiorari questions solely the last of these four rulings.

#### SUMMARY OF ARGUMENT

1. The judgment below should be affirmed without reaching any constitutional issue. The federal constitutional question which Pulley tenders is highly abstract and is likely to be either mooted or concretized by further proceedings in the California Supreme Court. That court is still developing standards and procedures for the substantive review of death sentences. It should be permitted to do so in the first instance. The limited federal habeas corpus relief ordered

below to prevent Harris' execution without any state appellate review of the appropriateness of his death sentence was necessitated by the summary denials of his several state postconviction petitions. Sound principles of federalism now counsel against proceeding further to adjudicate his federal habeas corpus claims (several of which were remanded to the district court by portions of the Ninth Circuit's decision on which Pulley has not sought certiorari) before the California Supreme Court has applied its own standards of proportionality review to Harris' case. The Ninth Circuit properly prohibited the State of California from executing Harris pending clarification of his state and federal rights to appellate review, and remitted him to the exhaustion of state remedies which are likely to produce such clarification.

2. While the exact scope of substantive appellate review of death sentences under California law is still in the course of development by the California Supreme Court, it is uncontestable that (a) some appellate review of the fitness of a death sentence is provided by state law as a matter of right, and (b) Harris' death sentence was affirmed and his state postconviction petitions were summarily denied without his having been afforded any review of the fitness of that sentence. This amounts to the arbitrary denial of recourse to an established state adjudicatory procedure and thus a denial of due process of law. The judgment below can and should be affirmed upon this ground, without reaching the broader question whether the Eighth Amendment entitles a death-sentenced defendant to state appellate sentencing review.

3. However, if the issue is reached, the Eighth Amendment does entitle a death-sentenced defendant to meaningful appellate review of the substantive propriety of his sentence. This was recognized last Term in Zant v. Stephens, under a capital-sentencing scheme which is indistinguishable for present purposes from California's. Zant merely makes explicit what is implied in the Court's previous Eighth Amendment decisions dealing with the death penalty: that to leave the infliction of the punishment of death to the unreviewed judgments of individual juries entails a risk of inconsistent and arbitrary sentencing decisions that is unacceptable with life at stake. The overwhelming consensus of the States recognizes that substantive appellate review is the condition of evenhandedness in capital

sentencing. Without it, a broadly discretionary system such as California has at the trial level cannot meet the command of the Eighth Amendment that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

#### ARGUMENT

##### I. INTRODUCTION: CALIFORNIA'S DEATH-SENTENCING PROCEDURES

The issues presented for this Court's consideration are framed by the California capital-sentencing procedures employed in Harris' case. Harris was tried under a statute enacted in 1977, <sup>4/</sup> since super-

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<sup>4/</sup> 1 Cal. Stats. 1977, ch. 316, pp. 1255-1266. The essential provisions of the 1977 enactment were codified as Cal. Penal Code §§ 190-190.6. This 1977 statute replaced a mandatory death-penalty law enacted in 1973 (1 Cal. Stats. 1973, ch. 719, pp. 1297-1302) which was invalidated in Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101,

seded. 5/

A. Trial Procedures

Under the 1977 statute, a person convicted of first-degree murder was sentenced to life imprisonment unless one or more "special circumstances" was found. Cal. Penal Code §§ 190, 190.2. 6/ If a "special circumstance" was found, the punishment was either death or life imprisonment without possibility of parole. §§ 190, 190.2. The "special

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4/ continued

134 Cal. Rptr. 650 (1976), under the authority of Woodson v. North Carolina, 428 U.S. 280 (1976), and [Stanislaus] Roberts v. Louisiana, 428 U.S. 325 (1976).

5/ Proposition 7, the "Briggs Initiative," approved at the general election of November 7, 1978, replaced the 1977 statute with provisions currently in effect. These are codified in present Cal. Penal Code §§ 190-190.7 (West 1983 cum. pocket part). One of the provisions of the Briggs Initiative was before the Court in California v. Ramos, 51 U.S.L.W. 5220 (U.S., July 6, 1983).

6/ All references to "Cal. Penal Code § \_\_\_\_\_," "Penal Code § \_\_\_\_\_," or "§ \_\_\_\_\_," are to the 1977 version of the California Penal Code. See notes 4 and 5 supra.



circumstances" were enumerated in Penal Code § 190.2. They included those found in Harris' case: that the murder was willful, deliberate and premeditated, and was committed during the commission of a robbery (§ 190.2(c) (3)(i)) or a kidnaping (§ 190.2(c)(3)(ii)), and that the defendant was convicted of more than one murder (§ 190.2(c)(5)).

"Special circumstances" were alleged in the charging paper and tried with the issue of guilt at the first phase (hereafter, "the guilt phase") of a bifurcated trial. §§ 190.1(a), (c), 190.4(a). At that phase, the trier of fact (hereafter, "the jury") determined guilt and degree of murder, and was required to make a finding whether each "special circumstance" allegation was true or not true. §§ 190.1(a), 190.4(a). A "special circumstance" could be found true only if proved beyond a reasonable doubt. §190.4(a).

If the jury found first-degree murder and a special circumstance at the guilt phase, the trial proceeded to a sentencing hearing (hereafter, "the penalty phase"). §§ 190.3, 190.4(a). Additional evidence was received if offered, and the jury's attention was directed to a list of ten aggravating and mitigating circumstances enumerated in Penal Code § 190.3.<sup>7/</sup>

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7/ Section 190.3, ¶5 provided:

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a

"After having heard and received all of the evidence," the jury was to "consider, take into account and be guided by the aggravating and mitigating circumstances referred to" in this list, and was to "determine whether the penalty shall be death or life imprisonment without the possibility of parole."<sup>8/</sup>

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7/ continued

moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

8/ Cal. Penal Code § 190.3, ¶6: "After having

The jury's sentencing determination was not otherwise structured. (We make this point not to criticize these trial-level procedures here, but simply to place in proper context the issue of the role of appellate review in California's 1977 death-sentencing scheme.<sup>9/</sup>) The jury was not instructed to weigh aggravating against mitigating factors. Indeed, the

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8/ continued

heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole."

9/ It is plain from Zant v. Stephens, 51 U.S.L.W. 4891 (U.S., June 22, 1983), that the Eighth Amendment's requirements regarding appellate review in death cases depend upon the nature of the trial proceedings which, under any State's particular capital-sentencing scheme, its appellate courts are called upon to review. Thus, although the only issues before the Court within the scope of Pulley's petition for certiorari in the present case have to do with proceedings at the appellate level under the 1977 statute, those appellate proceedings must be viewed within the framework of the 1977 scheme as a whole.

ten listed factors were not explicitly designated as "aggravating" or "mitigating."<sup>10/</sup> No burden of proof was provided to govern the jury's consideration of them, except that (by judicial construction) prior violent offenses proffered by the prosecution in

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<sup>10/</sup> They are denominated simply as "factors" to be "take[n] into account" in the paragraph that sets them out, § 190.3, ¶5, note 7 supra, and are then called collectively "aggravating and mitigating circumstances" in the following paragraph, note 8 supra. Some of the factors are obviously either aggravating (e.g., "[t]he presence ... of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence," § 190.3 (b)) or mitigating (e.g., "[w]hether ... the defendant was an accomplice [whose] ... participation in the commission of the offense was relatively minor," § 190.3(i)). However, others might well be viewed by particular juries as aggravating and by other juries as mitigating: e.g., "[w]hether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of ... the affects [sic] of intoxication," § 190.3(g); and the list leaves each individual jury (or juror) free to determine, for example, whether the "absence of [violent] criminal activity" under subsection 190.3(b) is a mitigating factor or simply a neutral one.

aggravation 11/ were required to be proved beyond a reasonable doubt.12/ (Jury unanimity was not, however, required in the finding of a prior violent offense before it could be considered as an aggravating circumstance.) The jury was not required to specify in its life-or-death verdict which -- if any -- aggravating or mitigating circumstances it had found, or otherwise to state the reasons for its ultimate sentencing determination.13/ It was not told that it, or any individual juror in his or her deliberations, had to find any particular

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11/ Cal. Penal Code § 190.3(b), note 7 supra.

12/ People v. Robertson, 33 Cal.3d 21, 53-55, 655 P.2d 279, 297-299, 188 Cal. Rptr. 77, 95-97 (1982) (plurality opinion); id., 33 Cal.3d at 60-63, 655 P.2d at 302-305, 188 Cal. Rptr. at 100-103 (concurring opinion of Justice Broussard).

13/ See People v. Frierson, 25 Cal.3d 142, 178-179, 599 P.2d 587, 608-609, 158 Cal. Rptr. 281, 302-303 (1979)(plurality opinion); People v. Jackson, 28 Cal.3d 264, 316-317, 618 P.2d 149, 176, 168 Cal. Rptr. 603, 630 (1980)(plurality opinion).

fact or circumstance to warrant the choice of death over life imprisonment without parole. There was no burden of proof on the ultimate issue. 14/

If the jury returned a death verdict, the defendant was deemed to have made a motion to modify the verdict. Cal. Penal Code § 190.4(e). In ruling on this motion, the trial judge was to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances ... and ... make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." Ibid. The judge was to "state on the record the reason for his findings." Ibid.

B. Appellate procedures

Under California law predating 1977,

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14/ See People v. Frierson, note 13 supra, 25

"[w]hen upon any plea a judgment of death is rendered, an appeal is automatically taken" to the California Supreme Court. Cal. Penal Code § 1239(b) (West 1982).<sup>15/</sup> Prior to 1977, it was settled that this automatic appeal did not encompass substantive sentencing review, as distinguished from review of procedural or evidentiary errors in the trial proceedings and review of the sufficiency of the evidence of guilt.<sup>16/</sup> The 1977 statute provided that "[t]he denial of the modification of a death penalty verdict [by the trial judge] ... shall be reviewed on the

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14/ continued

Cal.3d at 180, 599 P.2d at 609, 158 Cal. Rptr. at 303.

15/ A 1982 amendment to § 1239(b) is not presently relevant. It appears in West's 1983 cumulative pocket part.

16/ In re Anderson, 69 Cal.2d 613, 623, 447 P.2d 117, 124, 73 Cal. Rptr. 21, 28 (1968), and cases cited.



defendant's automatic appeal," § 190.4(e), but did not elucidate the scope of appellate review.

The California Supreme Court first addressed its review function under the 1977 law in People v. Frierson, 25 Cal.3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979). Frierson's conviction and sentence were reversed on unrelated grounds. Anticipating retrial, three Justices examined the federal constitutionality of the statute and upheld it. Four deferred ruling on that question. 17/

In the opinion upholding the statute (hereafter, "plurality opinion"), Justice

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17/ Justice Richardson, joined by Justices Clark and Manuel, sustained the statute against both state and federal constitutional challenges. 25 Cal.3d at 172-188, 599 P.2d at 604-614, 158 Cal. Rptr. at 298-308. Justice Mosk, joined by Justice Newman, sustained the statute against state constitutional challenges. but reserved final decision as to its federal constitutionality. 25 Cal.3d at 188-196, 599 P.2d at 615-620, 158 Cal. Rptr. at 308-313. Chief Justice Bird and Justice Tobriner, in separate opinions, also reserved judgment on the federal issues. 25 Cal.3d at 196-199, 599 P.2d at 620-622, 158 Cal. Rptr. at 313-315.

Richardson responded to the contention that the federal Constitution required "'proportionality review,'" 25 Cal.3d at 180, 599 P.2d at 610, 158 Cal. Rptr. at 303, and that the 1977 statute provided none. He wrote that "the lack of any express provision for proportionality review is not fatal to the validity of a death penalty statute," 25 Cal.3d at 181, 599 P.2d at 610, 158 Cal. Rptr. at 304 (emphasis in original), citing Proffitt v. Florida, 428 U.S. 242 (1976), where "although the Florida statute contained no express provision for proportionality review, effective appellate review would be guaranteed by the requirement that the trial judge file written findings justifying the imposition of death [and] ... the Supreme Court of Florida 'considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar

result to that reached under similar circumstances in another case . . . ."

25 Cal.3d at 181, 599 P.2d at 610, 158 Cal. Rptr. at 304. See also 25 Cal.3d at 184, 599 P.2d at 612, 158 Cal. Rptr. at 305. Viewing Jurek v. Texas, 428 U.S. 262 (1976), in the same vein, the plurality thought it significant that "the United States Supreme Court has recently denied review of several death penalty cases from other states, the statutes of which also fail to provide for any proportionality review, but the courts of which have stated that they will perform a comparable function." 25 Cal.3d at 182, 599 P.2d at 610, 158 Cal. Rptr. at 304. Prior California cases established that the California Supreme Court was not to substitute its judgment for the sentencer's, but did not suggest "that we were powerless to vacate or reduce a

penalty which was so disproportionate as to amount to cruel or unusual punishment." 25 Cal.3d at 182, 599 P.2d at 611, 158 Cal. Rptr. at 305. "A disproportionate penalty would reasonably constitute 'error,' " reviewable on appeal. 25 Cal.3d at 183, 599 P.2d at 611, 158 Cal. Rptr. at 305.

"Moreover, we are now guided by well established proportionality principles of general application. In reviewing assertions that a particular sentence amounts to cruel or unusual punishment under the state Constitution (art. I, § 17), we must determine whether the penalty 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (In re Lynch (1972) 8 Cal.3d 410, 424 [105 Cal. Rptr. 217, 503 P.2d 921] ... ; see also People v. Wingo (1975) 14 Cal.3d 169, 182-183 [121 Cal. Rptr. 97, 534 P.2d 1001] [proportionality review on a case-by-case basis for offenses involving a wide range of conduct]; People v. Anderson, ... 6 Cal.3d 628, 641-645 [100 Cal. Rptr. 152, 493 P.2d 880 (1972)] and cases cited [proportionality review in earlier death penalty cases].

"In determining disproportionality under Lynch, we examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (8 Cal.3d at p. 425.) In addition, we ascertain whether more serious crimes are punished in this state less severely than the offense in question. If so, 'the challenged penalty is to that extent suspect.' (Id., at p. 426.) Finally, under Lynch we compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having identical or similar constitutional provisions regarding cruel and/or unusual punishment. (Id., at p. 427.) Although not all of these tests of disproportionality may be appropriate in reviewing a sentence of death in a particular case, our Lynch principles demonstrate our awareness of a constitutionally derived responsibility to assess the proportionality of a particular punishment in criminal cases generally to assure that justice is dispensed in a reasonably evenhanded manner. Such a responsibility and commitment borne in criminal cases which invoke a more modest sanction can be no less when the penalty is most extreme." (25 Cal.3d at 183, 599 P.2d at 611-612, 158 Cal. Rptr. at 305.) 18/

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18/ In this quotation, the emphasis and all brackets except the parallel cite for Anderson are found in the original.

In People v. Jackson, 28 Cal.3d 264,  
618 P.2d 149, 168 Cal. Rptr. 603 (1980),

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18/ continued

The principle established in In re Lynch -- that the California Constitution affords relief against a punishment that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity," 8 Cal.3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226 -- has been developed in subsequent cases. Lynch itself involved a facial attack upon the statutory penalty for a particular crime: life imprisonment for recidivist indecent exposure. Applying Lynch in In re Foss, 10 Cal.3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974), and In re Grant, 18 Cal.3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976), the California Supreme Court struck down over-long mandatory parole preclusion periods under California's former Indeterminate Sentencing Law, even while recognizing that such preclusion might be appropriate for some offenders convicted of the categories of crimes in question. What was wrong with the preclusions was "their overbreadth in absolutely prohibiting parole for substantial periods of time without regard to the gravity of the particular offense, the relevance, remoteness in time, or seriousness of the prior offenses, the nature of the offender, or the existence of possible mitigating circumstances," In re Grant, supra, 18 Cal.3d at 8 n.6, 553 P.2d at 594-595 n.6, 132 Cal. Rptr. at 434-435 n.6. In People v. Wingo, 14 Cal.3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975), the court dealt with an assault statute covering a broad spectrum of differentially culpable conduct. It accepted the contention that "there may ... be occasions where because of the lack of culpability of the individual offender a

the California Supreme Court for the first time sustained a death sentence under the 1977 statute. Writing again for a three-member plurality, Justice Richardson

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18/ continued

life-maximum sentence would be an unconstitutional application of [this statute]." 14 Cal.3d at 181, 534 P.2d at 1011, 121 Cal. Rptr. at 107. But because there were other occasions on which the application of the statute would be constitutionally unexceptionable, the court preferred to wait until the California Adult Authority acted to fix the individual offender's sentence before adjudicating his "'vested right' in insuring that his term be fixed proportionately to his offense." 14 Cal.3d at 182, 534 P.2d at 1012, 121 Cal. Rptr. at 108. In In re Rodriguez, 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), the individual defendant had already served 22 years in prison for a violation of California Penal Code § 288 (lewd and lascivious acts on a child). The court noted that a 22-year sentence might well be permissible for some offenders under § 288, 14 Cal.3d at 647, 537 P.2d at 390, 122 Cal. Rptr. at 558, but invalidated Rodriguez's 22-year sentence as "disproportionate to the individual prisoner's offense," 14 Cal.3d at 652, 537 P.2d at 393, 122 Cal. Rptr. at 561, noting that the Lynch "techniques [of analysis] are appropriate not only to the examination of statutes challenged on their face, but also to terms as fixed by the Authority in individual cases," 14 Cal.3d at 653-654, 537 P.2d at 395, 122 Cal. Rptr. at 563. See also, e.g., People v. Keogh, 46 Cal. App.3d 919, 928-933, 120 Cal. Rptr. 817, 822-825 (1975); People v. Vargas, 53 Cal. App.3d 516, 533-539, 126 Cal. Rptr. 88, 100-104 (1975).

adopted his Frierson discussion of "[t]he issue of proportionality review." 28 Cal.3d at 317, 618 P.2d at 176, 168 Cal. Rptr. at 630. Responding to an "argument that because the California Legislature rejected proposed legislation to add proportionality review to the 1977 law, we should not 'read into' that law similar provisions in order to preserve its constitutionality," 28 Cal.3d at 317, 618 P.2d at 176, 168 Cal. Rptr. at 630, the Jackson plurality repeated its Frier-son observation that the Legislature may well have thought an express provision for proportionality review "wholly unnecessary in the light of ... Proffitt and Jurek ... which had upheld Florida and Texas statutes containing no express provision whatever for proportionality review." 28 Cal.3d at 317, 618 P.2d at 176-177, 168 Cal. Rptr. at 630-631 (emphasis in



original).

"It is also suggested that the form of proportionality review which Frierson assures will be available (based upon the three-pronged test of In re Lynch ... ) is too narrow because it fails to determine whether the penalty is proportional to other sentences imposed for similar crimes. This statement, however, appears to ignore Frierson's express reference to the second and third prongs of the Lynch test, under which a comparable inquiry is to be made. .... In any event, as we indicated in Frierson ... , we stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court." (28 Cal.3d at 317, 618 P.2d at 177, 168 Cal. Rptr. at 631.)

Three Justices dissented in Jackson, two arguing specifically that proportionality review should not be read into the 1977 statute because of its legislative history, and that the measure of proportionality review promised by Frierson was, in any event, inadequate to meet federal constitutional requirements. 28 Cal.3d at 358-363, 618 P.2d at 190-194, 168 Cal. Rptr. at 644-648. The fourth vote to uphold the

statute was cast by Justice Newman, who wrote that "courts are not timid in reading into legislation various procedural and other rules deemed constitutionally required that the draftsmen may have overlooked or rejected," 28 Cal.3d at 319, 618 P.2d at 178, 168 Cal. Rptr. at 632, and that he agreed with the plurality's rejection of arguments that the 1977 statute was unconstitutional for want of proportionality review. 28 Cal.3d at 318, 618 P.2d at 177, 168 Cal. Rptr. at 631.

We have described at page 8 supra the California Supreme Court's affirmance of respondent Harris' death sentence, the second which it sustained under the statute. Eleven weeks after the Ninth Circuit's decision in the present case, the California Supreme Court handed down opinions affirming a third. People

v. Easley, 33 Cal.3d 65, 654 P.2d 1272, 187 Cal. Rptr. 745 (1982) (decision on rehearing pending). Rehearing has since been granted in Easley, and the case has been reargued. However, the original opinions deserve note. <sup>19/</sup> Six Justices sat in Easley. A three-member plurality (Justices Richardson, Newman and Kaus) upheld the federal constitutionality of the 1977 statute on authority of Frierson and Jackson. Justice Mosk (who deferred decision on this issue in Frierson and dissented in Jackson) filed a brief notation of concurrence in Easley. Two Justices dissented.

Justice Kaus, in addition to joining the plurality opinion, wrote separately to state his view that "the court's pronouncements on the subject of proportionality

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<sup>19/</sup> Rehearing was sought, and presumably granted, on issues other than those relating to proportionality review.

review [in Frierson and Jackson] ... can reasonably be interpreted to mean simply that nothing in the 1977 statute or its legislative history precludes this court from exercising such review, and to leave open the question of the specific form of such review that will be undertaken." 654 P.2d at 1293, 187 Cal. Rptr. at 765. Recapitulating the Frierson and Jackson plurality opinions, Justice Kaus noted that Frierson had relied "[i]n particular ... on State v. Simants (1977) 197 Neb. 549, 250 N.W.2d 881 and even quoted part of a 'promise' by that court that it would conduct proportionality review. This promise was in no way contingent on further prodding from Washington, D.C." 654 P.2d at 1293, 187 Cal. Rptr. at 766. 20/

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20/ In a footnote to this passage, Justice Kaus notes that the non-final decision of the Ninth Circuit in the present case "has interpreted

Justice Kaus noted Frierson's reference to "our experience with 'well established proportionality principles of general application'" under In re Lynch and its progeny. He noted the Jackson dissenting argument "that review of compliance with the prohibition against cruel and/or unusual punishments under the Lynch criteria was not the kind of proportionality review which, in the dissent's view, was constitutionally required." He noted the Jackson plurality's response invoking "the second prong of the Lynch test, which requires a court to determine 'whether more serious crimes are punished in this state less severely than the offense in question.'" He noted the Jackson plurality's insistence that "'we

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20/ continued

Frierson as extending a similar promise to persons condemned to death in this state." 654 P.2d at 1293 n.6, 187 Cal. Rptr. at 766 n.6.

stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court.'" 654 P.2d at 1293-1294, 187 Cal. Rptr. at 766-767. Then Justice Kaus went on:

"With all respect, if -- I said if -- the Lynch approach is inadequate, this 'you call us, we won't call you' language can hardly be described as a holding on the two basic issues yet to be decided: is proportionality review constitutionally mandated and, if so, just what type of review is involved.

. . . .

"For these reasons I consider the issues of the necessity and nature of proportionality review as unsettled by this court's prior decisions. I express no personal view on these questions, but obviously before any judgment of death is actually carried out, we will have to decide whether such review is constitutionally mandated and, if so, just what it entails. 8/ If the decision is that review is required, it will have to be afforded to each person condemned to

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<sup>8/</sup> The issue is presently before us in In re Jackson, Crim. 22165." (Footnote in original.)

death, including Easley. <sup>9/</sup>" (654 P.2d at 1294, 187 Cal. Rptr. at 767.)

Justice Kaus believed that "an appeal from a judgment imposing the death penalty ... examines the trial record for reversible error. Proportionality review, on the other hand, would solely be a function of this court. Therefore, I join in affirming the judgment, but only on my understanding that the affirmance does not preclude the defendant from seeking proportionality review in this court." 654 P.2d at 1294, 187 Cal. Rptr. at 767.

Chief Justice Bird dissented in Easley, writing that she could not agree with Justice Kaus "that the issue of proportionality review may be resolved

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<sup>9/</sup> The next problem — and it is a major one — would be the ability of this court, as presently staffed and equipped, to conduct meaningful review." (Footnote in original.)

some time in the future." 654 P.2d  
at 1294-1295, 187 Cal. Rptr. at 767.

" ... Although the appellant in this case is told he is 'not preclude[d] from seeking proportionality review in this court,' he is not advised how to go about it. Another capital defendant whose death sentence was affirmed by this court on direct appeal attempted to raise the issue of proportionality review by means of habeas corpus. (See In re Robert Alton Harris, Crim. No. 22380.) This court denied his petition -- summarily and without any indication that he had merely requested the wrong type of relief. 10/ If there is some post appeal procedure for proportionality review, as is necessarily implied by the concurring opinion, this court has kept its existence a dark secret." (654 P.2d at 1306, 187 Cal. Rptr. at 778.)

II. THE DECISION BELOW CAN AND  
SHOULD BE AFFIRMED WITH NO  
NEED TO REACH THE EIGHTH  
AMENDMENT ISSUE PRESENTED  
BY PETITIONER

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"10/ It is true that the issue of proportionality review is within the technical scope of the cause before this court in In re Jackson, Crim. No. 22165. However, that case raises other legal issues as well . . . . Thus, the issuance of the



Two considerations call for affirmance of the Ninth Circuit's judgment without regard to the Eighth Amendment questions that Warden Pulley asks this Court to resolve. We note them at the outset because a disposition on these grounds would respect this Court's long-standing rules against adjudicating "constitutional issues affecting legislation ... in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; [or] if the record presents some other ground upon which the case may be disposed of . . . ." Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947).

The Court has only recently reminded

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"10/ continued

order to show cause in Jackson does not necessarily indicate we will reach the issue of proportionality there." (Footnote in original.)

us of the importance of the Rescue Army "policy of strict necessity." Minnick v. California Department of Corrections, 452 U.S. 105, 122 (1981). It has pointed out that the application of the policy to avoid premature constitutional adjudication in Rescue Army was based upon "the 'highly abstract form' in which the constitutional issues were presented, ... the 'ambiguous' character of the California court's construction of the [state law involved] ..., and a belief that further proceedings in the state court would ultimately tender 'the underlying constitutional issues in clean-cut and concrete form,'" Minnick v. California Department of Corrections, supra, 452 U.S. at 123. Each of those concerns is rampant in the present case. Moreover, here, as in Parker v. County of Los Angeles, 338 U.S. 327 (1949), it appears from the superven-

ing Easley opinions in the California Supreme Court that state-court proceedings may already be afoot which would moot or concretize Pulley's tendered Eighth Amendment questions.

Decision of those questions now is not strictly, or even mildly, necessary. The disposition of Harris' federal habeas corpus case by the Ninth Circuit simply remits it to the California Supreme Court for initial consideration of the proportionality of Harris' death sentence before other federal constitutional issues are taken up by the United States District Court. This was entirely proper on procedural grounds that require no substantive constitutional adjudication by this Court. (Part II-A infra.) The Ninth Circuit's disposition was also appropriate on a rudimentary due process ground. (Part II-B infra.) While this latter

ground does implicate a substantive constitutional issue, it is a very narrow one. The policy of avoiding constitutional decisions in advance of strict necessity implies the corollary that broader constitutional issues will not be reached if narrow ones suffice to resolve the case. E.g., Street v. New York, 394 U.S. 576, 581 (1969); Kolender v. Lawson, 51 U.S.L.W 4532, 4535 n.10 (U.S., May 2, 1983).<sup>21/</sup>

A. The Ninth Circuit's Judgment  
in Procedural Context

Both the procedural posture of this litigation and the precise disposition of

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<sup>21/</sup> "Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982), and cases cited. See also, e.g., United States v. American Railway Express Co., 265 U.S. 425, 435-436 (1924); Bondholders Committee v. Commissioner, 315 U.S. 189, 192 n.2 (1942).

the proportionality-review issue by the Ninth Circuit are obscured in Pulley's brief to this Court. Both should be kept in focus.

(1) Following summary denials of postconviction relief by three levels of California state courts, Harris filed the present habeas corpus petition in United States District Court. The district court dismissed it precipitously -- and erroneously, as the Ninth Circuit below held -- without (a) examining "all relevant parts of the state court record" (Cert. App. A-35; see id. at A-34 to A-39) bearing upon Harris' prejudicial publicity claim, or (b) providing Harris "an opportunity to develop the factual basis and arguments" concerning two specific claims of discriminatory application of the death penalty (Cert. App. A-25; see id. at A-29 to A-30, A-31 to A-32), to the extent

necessary to determine whether a federal evidentiary hearing on those claims was warranted. Consequently, the Ninth Circuit held that further proceedings on these three claims were required in the district court. (Cert. App. A-23 to A-32, A-33 to A-39.) Pulley has not sought certiorari to review that holding.

(2) Also, finding that "[t]he California [Supreme C]ourt ... did not undertake any proportionality review in this case" after having stated in Frierson and Jackson that it would do so (Cert. App. A-21), the Ninth Circuit ordered the district court to (a) "grant the petition relieving [Harris] ... from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days ... the proportionality review announced in People v. Frierson ... and People v. Jackson" (Cert.

App. A-68), and (b) thereafter, "[i]f it becomes necessary, ... [to] examine the California Supreme Court's proportionality decision to make certain that it is consistent with Proffitt v. Florida ... and Gregg v. Georgia ..." (Cert. App. A-2 to A-3).<sup>22/</sup> Thus the Ninth Circuit did not require the California Supreme Court to conduct any particular form of proportionality review specified by the Circuit, but rather required it only to conduct whatever form of proportionality review the California Supreme Court itself

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<sup>22/</sup> The quoted passages are from the Ninth Circuit's summary of its decision, at the beginning of its opinion. In its "Conclusion" at the end of the opinion, it repeats the substance of the first passage in transposed order, writing that "[b]ecause the California Supreme Court did not undertake the proportionality review it announced in People v. Frierson ... and in People v. Jackson," the district court is instructed to relieve Harris of his death sentence unless the California Supreme Court "undertakes ... the proportionality review." (Cert. App. A-71.) Obviously, "the proportionality review" here means again "the proportionality review ... announced in People v. Frierson ... and in People v. Jackson."

had said in Frierson and Jackson that it would conduct. The consistency of this review with Gregg and Proffitt was then to be considered by the district court, together with Harris' other federal constitutional claims on which further district court proceedings were necessary.

Thus, the Circuit Court declined to fashion a death-sentencing procedure for California, leaving the California Supreme Court to fashion its own. This was eminently wise, as Zant v. Stephens, 51 U.S.L.W. 4891 (U.S., June 22, 1983), and Barclay v. Florida, 51 U.S.L.W. 5206 (U.S., July 6, 1983), most recently attest. The Circuit Court declined to permit federal habeas corpus litigation to proceed further on this or other issues until the California Supreme Court had both clarified "the form of proportionality review which Frierson assures will



be available," People v. Jackson, supra, 28 Cal.3d at 317, 618 P.2d at 177, 168 Cal. Rptr. at 631, and applied that form of proportionality review to Harris' case. This too was eminently wise, as Rose v. Lundy, 455 U.S. 509 (1982), attests. For, while Harris' federal constitutional contentions, including his proportionality-review contention, were all technically exhausted under the rule of Roberts v. LaVallee, 389 U.S. 40 (1967)(per curiam), the unexplained tension between the California Supreme Court's Frierson/Jackson assurances and its performance in Harris' case plainly suggested the desirability of "'allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights,'" Rose v. Lundy, supra, 455 U.S. at 518, quoting Duckworth v. Serrano, 454 U.S. 1, 3 (1981)(per curiam).

This was precisely what the Court of Appeals did, and nothing more. Its disposition required the California Supreme Court to begin (not to complete) within four months any procedure of the California Court's choosing which would give Harris "the proportionality review announced in ... Frierson ... and ... Jackson" (Cert. App. A-68). The scope and manner of that review were left to the California Court. The California Court was left free to interpret Frierson/Jackson review broadly or narrowly, on either state-law or federal-law grounds. Since Frierson and Jackson had grounded proportionality review both upon the obligation "to guard and protect rights secured by the Constitution," Ex parte Royall, 117 U.S. 241, 251 (1886), and upon "well established proportionality principles of general application" under state

law, People v. Frierson, supra, 25 Cal.3d at 183, 599 P.2d at 611, 158 Cal. Rptr. at 305, this was manifestly appropriate. See Parker v. County of Los Angeles, supra, 338 U.S. at 332. To be sure, the product of the California Supreme Court's Frierson-Jackson review would then be subject to assessment by the United States District Court "to make certain that it is consistent with Proffitt ... and Gregg ..." (Cert. App. A-2 to A-3). But such an assessment would have been required no matter what the Ninth Circuit did -- unless, of course, it had simply permitted Harris' execution to be carried out.

If Harris had not been slated for imminent execution, the Ninth Circuit might have achieved the same result by remitting him to the further pursuit of state remedies without considering at all, at this stage, any Eighth Amendment issue.

But Harris was slated for imminent execution. When this case reached the federal courts, every cognizant California state court -- including the California Supreme Court -- had summarily dismissed his postconviction petitions and denied him a stay of execution. Federal habeas corpus alone stood between Harris and the executioner. After the Ninth Circuit granted him a stay and decided his case, Justice Kaus indicated in Easley that there may be some yet undetermined procedure by which the California Supreme Court means to conduct proportionality review in death cases, and, if so, that such review "will have to be afforded to each person condemned to death." Pages 40-41 supra. The fashioning of a procedure of this sort is within the sole province of the California Court, where the Ninth Circuit's decision below properly leaves it. But Harris is

entitled to know whether such a procedure exists, and what it is, so that he can resort to it before being put to death. Cf. Young v. Ragen, 337 U.S. 235 (1949); Jennings v. Illinois, 342 U.S. 104 (1951).

All that the Ninth Circuit's decision does is to ensure that this clarification will occur before Harris dies, and before his federal constitutional claims are finally adjudicated by the federal courts. Orderly proceedings for the protection of the constitutional rights of a death-sentenced inmate in both sets of courts having "the solemn responsibility ... 'to guard, enforce, and protect every right granted or secured by the Constitution'".<sup>23/</sup> requires no less. On this account alone, the judgment of the Ninth Circuit represents the most appropriate disposition of

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<sup>23/</sup> Steffel v. Thompson, 415 U.S. 452, 460-461 (1974), quoting Robb v. Connolly, 111 U.S. 624, 637 (1884).

the case in its present posture, and should be affirmed.

B. Due Process of Law

The Ninth Circuit's judgment was also proper under elemental due process principles. The Circuit Court found (1) that the California Supreme Court had "stated that it would review each death penalty under the challenged statute to determine whether the penalty was being applied proportionately," Cert. App. A-20, 24/ and (2) that the California Supreme Court "did not undertake any proportionality review in this case," Cert. App. A-21. These two findings plainly establish a due

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24/ Technically, the Court of Appeals wrote that "a plurality of the California Supreme Court in ... Frierson" stated this. Cert. App. A-20. However, the Court of Appeals then went on to note the endorsement and amplification of the Frierson opinion by a majority of the California Supreme Court in Jackson. Cert. App. A-20 to A-21. See pages 32-36 supra.

process violation.

Pulley does not seriously question the second finding, and it is not questionable. <sup>25/</sup> Pulley does question the first. His two pages devoted to this subject (Pet. Br. 22-23) speak for themselves, when compared with the actual holdings and language of the California

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<sup>25/</sup> Pulley does assert that "Robert Harris has pressed his claims on 13 separate occasions in 6 separate courts" and has therefore "had all the process he is due." Pet. Br. 48-49. However, the meaning of this and like passages in Pulley's brief is explained at Pet. Br. 43: "It is because Harris has already had so many opportunities to present any claim that the death penalty has been imposed arbitrarily or discriminatorily as to him, that we have repeatedly said that he has had whatever 'proportionality review' may be deemed necessary." Pulley does not contend that the California Supreme Court has in fact reviewed the substantive propriety of Harris' death sentence, on proportionality grounds or any others. Nor could such a contention survive one minute's scrutiny. The California Supreme Court opinion on Harris' automatic appeal meticulously enumerates and discusses fifteen separate and distinct issues which it is deciding, none of which relates remotely to any substantive review of the sentence. People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). The Court denied his postconviction habeas petition summarily, without opinion.

Supreme Court in Frierson and Jackson, which we have set forth in detail at pages 27-36 supra. Pulley would apparently have the court in Frierson and Jackson saying: "Frierson and Jackson contend that the 1977 statute is unconstitutional because it fails to provide for proportionality review. We reject this contention on the ground that we have ample power to review the proportionality of death sentences. [Sotto voce: But we won't.] Moreover, well-established proportionality principles of general application under California law call upon us to assess whether even lesser punishments than death are being proportionately and evenhandedly dispensed. Such a responsibility and commitment can be no less when the penalty is most extreme. [Sotto voce: But it is less.]" To read the solemn judicial pronouncements of a State's highest court



in this manner is an indefensible canard.

We therefore start with the proposition that the California Supreme Court meant what it said when it spoke in Jackson of "the form of proportionality review which Frierson assures will be available (based upon the three-pronged test of In re Lynch)," 28 Cal.3d at 317, 618 P.2d at 177, 168 Cal. Rptr. at 631.<sup>26/</sup> This assurance of appellate review of the substantive fitness of a

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<sup>26/</sup> No doubt the scope of this review — and in particular the question to what extent an application of the second prong of Lynch requires cross-case factual comparisons — remains unresolved in the California Supreme Court. Justice Kaus' Easley opinion demonstrates as much. But, while Justice Kaus has raised the issues whether and what type of proportionality review should be provided "if ... the Lynch approach is inadequate," see page 40 supra, he has not questioned that the California Supreme Court is committed at the least to proportionality review of death sentences under Lynch. For him, the open questions relate to "the specific form of such review that will be undertaken." See page 38 supra. Those questions are without consequence in the present case, since it is indisputable that Harris has been give no substantive review of his death sentence, of any sort.

death sentence invokes Fourteenth Amendment due process protection whether or not it is required by the Eighth. "We have repeatedly held that state [law] ... may create ... interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones, 445 U.S. 480, 488 (1980). See, e.g., Goss v. Lopez, 419 U.S. 565, 572-574 (1975); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463 (1981). "Once a State has [created a right of this sort] ..., due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" Vitek v. Jones, supra, 445 U.S. at 488-89. For, "[t]he touchstone of due process is the protection of the individual against

arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). See also Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). Thus it is that "an arbitrary disregard of [a state-created right] ... is a denial of due process of law." Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

Among the sorts of rights commanding due process protection, although originating in state law, are rights of "potential litigants [to invoke the] use of established adjudicatory procedures." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (state-created right to administrative forum); see also Hicks v. Oklahoma, supra (state-created right to jury determination of criminal sentence). A state appellate court may not deny a litigant recourse to such procedures arbitrarily. Ibid. Even where a mere

chose in action is concerned, "[a]s our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Logan v. Zimmerman Brush Co., supra, 455 U.S. at 433; see also United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

The application of these principles here requires no elaborate reasoning. An adjudicatory procedure which provides condemned persons with a substantive appellate review of the fitness of their death sentences before they are executed constitutes a material right. Its materiality is not diminished by the fact that it originates in state law, or by the fact that its precise contours are still in the process of development by the California Supreme Court. To the con-

trary, the fact that that court is still developing the scope of the right as a matter of state law underlines the importance to each condemned person of receiving the considered judgment of the California Supreme Court upon the propriety of the death sentence in his or her individual case. Whatever the exact extent of that review, it entails at least an independent evaluation, by dispassionate judges of statewide jurisdiction and experience, of the appropriateness of a death sentence decreed by a local jury. This much was plainly vouchsafed by the California Supreme Court, not as a matter of grace, but as a matter of "well established proportionality principles of general application," People v. Frierson, supra, 25 Cal.3d at 183, 599 P.2d at 611, 158 Cal. Rptr. at 305. It may not be arbitrarily denied consistent with due process.

Nor should Pulley's attempt to cast this Court in the role of the California Supreme Court by asking this Court to pass its own judgment on the fitness of Harris' death sentence for his crime (Pet. Br. 46-47) be countenanced. See Eddings v. Oklahoma, 455 U.S. 104, 117 (1982). The primary responsibility for that judgment lies with the California Court, where the Ninth Circuit has correctly placed it.

III. THE DECISION OF THE EIGHTH  
AMENDMENT ISSUE BELOW SHOULD  
BE AFFIRMED

While the Eighth Amendment issue is unnecessary to the disposition of this case, its decision by the Ninth Circuit was correct on the merits.

Pulley's primary submission here is that this Court's repeated and extended references to meaningful appellate review

of death sentences in Gregg v. Georgia, 428 U.S. 153, 166-168, 195, 198, 204-207 (1976)(lead opinion); id. at 211-212, 222-224 (opinion of Justice White); Proffitt v. Florida, 428 U.S. 242, 250-251, 253, 258-260 (1976)(lead opinion); and Jurek v. Texas, 428 U.S. 262, 269-270, 276 (1976)(lead opinion), were mere surplusage -- "merely frosting on an already constitutional cake" (Pet. Br. 25). We may readily agree that in Gregg the Court spoke of "the further safeguard of meaningful appellate review ... to ensure that death sentences are not imposed capriciously or in a freakish manner," 428 U.S. at 195 (emphasis added), and that in Proffitt it prefaced a description of the Florida appellate-review procedure (in which "[sentencing] decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances") with the

word "[m]oreover," 428 U.S. at 253.<sup>27/</sup> However, Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (lead opinion), unmistakably described "Furman's basic requirement" as "replacing arbitrary and wanton jury discretion with objective

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27/ Pulley says that Jurek sustained a capital sentencing scheme in which "no consideration whatsoever was given to any form of 'proportionality review.'" Pet. Br. 27. The fact is that, at the time of Jurek, the scope of sentence review by the Texas Court of Criminal Appeals was quite unclear. See 428 U.S. at 270. The Court of Criminal Appeals had construed the Texas statute in a fashion -- hardly compelled by the statutory language -- which permitted the introduction of "whatever evidence of mitigating circumstances the defense can bring [out]," 428 U.S. at 273. This evidence, together with evidence in aggravation, was to be considered in connection with the crucial statutory question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," see 428 U.S. at 269, 272-273. Since the question of probability is always one of degree, a review of "the sufficiency of the evidence to see if a 'yes' answer to [this] question ... should be sustained," 428 U.S. at 273, would obviously be expected to involve cross-case comparisons and to evolve a precedential base for them, over the course of repeated decisions by an appellate court following stare decisis principles. In determining whether a sufficient probability of future dangerousness had been established in any particular case, the reviewing court could hardly do otherwise than to



standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death" (emphasis added). Accord: Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion). It would be a remarkable Eighth Amendment that required "reviewability" without requiring review. The Court's opinions countenance no such anomaly. [Stanislaus] Roberts v. Louisiana, 428 U.S. 325,

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27/ continued

look to the facts of earlier cases in which it had held that a sufficient probability was or was not established. See note 29 infra. Doubtless, this is what the lead opinion in Jurek meant when it relied upon "judicial review of the jury's decision in a court with statewide jurisdiction" as providing "a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." 428 U.S. at 276. In any event, as the Court has since pointed out, its 1976 examination of the statutes then before it "did not lead us to examine all of [their] ... nuances." Zant v. Stephens, 456 U.S. 410, 414 (1982) (per curiam) (opinion certifying question). The lead opinion in Jurek was quite explicit concerning the limitations of what was then known about the way in which the Texas statute might subsequently be construed and administered. 428 U.S. at 270, 272 n.7.

335-336 (1976)(plurality opinion)("[a]s in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's decision"); Zant v. Stephens, 456 U.S. 410, 413 (1982)(per curiam)(opinion certifying question) ("[w]e recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court's construing the statute and reviewing capital sentences consistently with [Furman's] ... concern").

But, if the question of the constitutionally requisite nature of appellate sentencing review in death cases was ever open, it no longer is. Explicating Gregg in Zant v. Stephens, 51 U.S.L.W. 4891

(U.S., June 22, 1983), the Court last Term made unmistakably clear that the Gregg "plurality's approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate." Id. at 4894; see also id. at 4895 & n.19. Under California capital-sentencing practice, the discretion of juries to impose or withhold a death sentence at the trial level is at least as unconstrained as that of Georgia juries. (Compare the description of California's trial procedure at pages 18-25 supra with the description of Georgia's in Zant, 51 U.S.L.W. at 4893-4894, 4897-4898.)

Therefore, the Court's conclusion in Zant regarding the constitutional necessity for appellate review under the Georgia scheme is equally decisive here:

"Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We [have] ... been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious. ... As we noted in Gregg, 428 U.S., at 204-205, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances." (Id. at 4898.)

See also Barclay v. Florida, 51 U.S.L.W. 5206, 5211 (U.S., July 6, 1983)(plurality opinion); id. at 5211, 5215 (concurring opinion of Justice Stevens, referring, inter alia, to the Florida Supreme Court's "constitutionally-mandated responsibility

to perform meaningful appellate review," ibid.); California v. Ramos, 51 U.S.L.W. 5220, 5222 (U.S., July 6, 1983)(in Gregg, the lead opinion concluded that the Georgia scheme "met the concerns of Furman by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence"). Plainly, "meaningful appellate review of each death sentence" is an Eighth Amendment necessity.

The rule could not be otherwise. For the whole body of this Court's "Eighth Amendment decisions in the past decade [is] ... concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided." Hopper v. Evans, 456 U.S. 605, 611 (1982). They cannot be avoided if broad discretionary sentencing authority is given isolated

juries, each convened to hear a single case, and if their choice of death as punishment in that one case remains unchecked and unexamined by review procedures which compare the outcome in each case with others. 28/ Absent such appellate review, there can be no assurance "that capital punishment [will] be imposed fairly, and with reasonable consistency," as the Eighth Amendment requires. Eddings v. Oklahoma, supra, 455 U.S. at 112. In Gardner v. Florida, 430

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28/ See Gregg v. Georgia, supra, 428 U.S. at 206 (lead opinion):

"The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."

U.S. 349, 361 (1977)(plurality opinion), an omission from the appellate record of information used to impose a death sentence was recognized as rendering a "capital-sentencing procedure ... subject to the defects which resulted in the holding of unconstitutionality in Furman...." Can less be said of the omission of any substantive appellate review at all?

Pulley argues that there is no need for such review because a "presumptively valid" capital-sentencing procedure at the trial level produces "death judgments [that] ... are presumptively free of arbitrariness and caprice" (Pet. Br. 36), leaving a mere "hypothetical possibility of an occasionally disproportionate result" (Pet. Br. 39-40). See Pet. Br. 35-40. This argument founders legally in the wake of Zant's recognition that appellate review is one of the conditions

of a presumptively valid capital sentencing procedure. Pages 68-70 supra. But the deeper vice of the argument is its disregard for fact. Even a cursory reading of the appellate reports demonstrates that the "hypothetical possibility" of a disproportionate death sentence under a presumptively valid trial-level procedure is far from "hypothetical."<sup>29/</sup>

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<sup>29/</sup> In the following two dozen cases, among others, state appellate courts have found disproportionate, and therefore reduced, death sentences imposed under "presumptively valid" capital-sentencing procedures. Cases in which the appellate court disagreed with the sentencer's assessment of the relative weight of aggravating and mitigating circumstances in the particular case, without explicitly comparing the facts of the case to those in other cases, are designated "(a/m)." Cases in which the appellate court compared the appellant's sentence to those of co-participants in the same crime are designated "(co-p)." Cases in which the appellate court compared the appellant's sentence to those in unrelated cases are designated "(uc)." Florida cases in which the appellate result was affected in part by the fact that a jury had recommended a life sentence but had been overriden by the sentencing judge are designated "(j)." Under the unique Texas statute (see note 27 supra), the method for declaring a death sentence disproportionate is to find the evidence insuffici-



Pulley's related argument that state appellate review should not be constitu-

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29/ continued

ent to support a "yes" answer to the probability-of-future-dangerousness question, after comparing that evidence with the evidence in other cases where a "yes" answer was found supported or unsupported.

- State v. Brookover, 124 Ariz. 38, 39-42, 601 P.2d 1322, 1323-1326 (1979)(a/m)  
State v. Valencia, 132 Ariz. 248, 250-251, 645 P.d 239, 241-242 (1982)(a/m)  
State v. Graham, \_\_\_\_\_ Ariz. \_\_\_\_\_, \_\_\_\_\_, 660 P.2d 460, 463-464 (1983)(a/m)  
Giles v. State, 261 Ark. 413, 420-425, 549 S.W.2d 479, 483-485 (1977)(a/m)  
Sumlin v. State, 273 Ark. 185, 190, 617 S.W.2d 372, 375 (1981)(co-p)(uc)  
Henry v. State, 278 Ark. 478, 488-489, 647 S.W.2d 419, 425 (1983)(uc)  
Slater v. State, 316 So.2d 539, 542-543 (Fla. 1975)(co-p)  
Swan v. State, 322 So.2d 485, 489 (Fla. 1975)(a/m)(j)  
Halliwell v. State, 323 So.2d 557, 561-562 (Fla. 1975) (a/m)  
Provence v. State, 337 So.2d 783, 786-787 (Fla. 1976) (uc)(j)  
McCaskill v. State, 344 So.2d 1276, 1278-1280 (Fla. 1977) (uc)(j)  
Malloy v. State, 382 So.2d 1190, 1192-1193 (Fla. 1979) (co-p)(j)  
Neary v. State, 384 So.2d 881, 885-888 (Fla. 1980) (co-p)(j)  
Goodwin v. State, 405 So.2d 170, 172 (Fla. 1981)(a/m) (j)

[footnote continued on next page]

tionally required because federal habeas corpus is a sufficient "'safety net'" against disproportionate death sentences (Pet. Br. 38-40) fares no better. It stands every elementary tenet of federalism on its head.<sup>30/</sup>

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29/ continued

- Blair v. State, 406 So.2d 1103, 1108-1109 (Fla. 1981) (uc)  
People v. Carlson, 79 Ill.2d 564, 587-591, 404 N.E.2d 233, 243-245 (1980) (a/m)  
People v. Gleckler, 82 Ill.2d 145, 161-171, 411 N.E.2d 849, 856-861 (1980) (co-p) (uc)  
Coleman v. State, 378 So.2d 640, 649-650 (Miss. 1979) (uc)  
State v. McIlvoy, 629 S.W.2d 333, 341-342 (Mo. 1982) (co-p) (uc)  
Burrows v. State, 640 P.2d 533, 552-553 (Okla. Crim. App. 1982) (a/m)  
Munn v. State, 658 P.2d 482, 487-488 (Okla. Crim. App. 1983) (uc)  
Wallace v. State, 618 S.W.2d 67, 68-69 (Tex. Crim. App. 1981) (uc)  
Roney v. State, 632 S.W.2d 598, 601-603 (Tex. Crim. App. 1982) (uc)  
Garcia v. State, 626 S.W.2d 46, 48-52 (Tex. Crim. App. 1982) (uc)

30/ Federal habeas corpus is not designed as a means for the regular and systematic review of state criminal judgments, to ensure their consistency and evenhandedness. "[I]t is designed to

Finally Pulley argues that, "[i]n terms of its impact on the judiciary, the proposal [that state appellate courts

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30/ continued

guard against extreme malfunctions in the state criminal justice systems." Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (concurring opinion of Justice Stevens). It reaches only "the occasional abuse." Id. at 322 (majority opinion). "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. ... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." Barefoot v. Estelle, 51 U.S.L.W. 5189, 5191 (U.S., July 6, 1983). See, classically, Ex parte Royall, 117 U.S. 241, 251 (1886). Proportionality review of death sentences implicates several admixed interests: the "State's interest in enforcing its criminal laws," Arizona v. Many-penny, 451 U.S. 232, 243 (1981); see, e.g., Engle v. Isaac, 456 U.S. 107, 128 (1982); the State's interest in assuring the regularity and consistency of the judgments of its own tribunals (as reflected, for example, in the "well established proportionality principles of general application" which the Frierson opinion drew from In re Lynch, see pages 30-31 supra); and the state and federal constitutional rights of the death-sentenced appellant. It is for the state appellate courts in the first instance to "mediate federal constitutional concerns and [these] state interests," Moore v. Sims, 442 U.S. 415, 430 (1979). See, e.g., Schlesinger v. Councilman, 420 U.S. 738, 755-756 (1975); Trainor v. Hernandez, 431 U.S. 434, 443 (1977). A State's judicial system would be given neither the opportunity to oversee "the informed evolution of state

review the proportionality of death sentences] is staggering" (Pet. Br. 21) because of "the enormously burdensome factual review envisioned by the Ninth Circuit" (Pet. Br. 39). There are two answers to this.

First, the overwhelming consensus of the States today is that the task of reviewing the proportionality of death sentences is not too "burdensome" for their appellate courts. Thirty-six States other than California have discretionary death-penalty statutes. In two of these, the availability of proportionality review is presently unclear. The remain-

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policy by state tribunals," Moore v. Sims, *supra*, 442 U.S. at 430, nor "the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts," Huffman v. Pursue, 420 U.S. 592, 609 (1975). See Bellotti v. Baird, 428 U.S. 132, 146-147 (1976), and cases cited.

ing thirty-four jurisdictions provide for some form of appellate proportionality review -- twenty-eight by statute, and six by judicial decision. In all but one (or possibly two) of the latter thirty-four jurisdictions, the proportionality review which is undertaken involves a comparison of the sentence in the case at bar with sentences in other cases. 31/ Moreover,

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31/ The States are catalogued in Appendix A infra, which cites the relevant statute or leading judicial decision in each. Twelve States have no death penalty: Alaska, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, West Virginia, and Wisconsin. New York has none except a mandatory death penalty for murder by life-sentenced inmates, presently under constitutional challenge. The two capital-punishment States in which the availability of appellate proportionality review is presently unclear are Utah and Vermont. The six capital-punishment States in which proportionality review is a product of judicial decision rather than statute are Arizona, Arkansas, Florida, Illinois, Indiana, and Texas. Indiana is the only State in which the form of proportionality review provided appears to be limited to an assessment of the fitness of the death penalty on the facts of record in the case at bar, without comparison to other cases. The text above lists "possibly two" States in this category because Colorado law is silent on the issue.

California itself provides an elaborate form of state-wide comparative review of non-capital criminal sentences under the Uniform Determinate Sentencing Act, enacted in 1976. Finding in this statute that the purpose of punishment "is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances," Cal. Penal Code § 1170(a)(1) (West 1983 cum. pocket part), the Legislature furnished sentencing judges with detailed statutory and administrative guidelines for the initial determination of sentence.<sup>32/</sup> It

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<sup>32/</sup> See Cal. Penal Code §§ 1170(a)(2) - 1170.8 (West 1983 cum. pocket part); Cal. Civil and Criminal Court Rules 401-453 (West 1981) ("Sentencing Rules for the Superior Courts"). The statute (3 Cal. Stats. 1976, ch. 1139, pp. 5061-5178) provides that virtually all nontrivial criminal offenses are punishable by one of three specified periods of imprisonment (e.g., "two, three, or five years"); it provides that judges shall impose the middle term unless there are circumstances in aggravation or mitigation warranting the upper or

was nonetheless concerned that sentencing disparity would continue unless a state-wide comparative-review mechanism was established, and it therefore provided that:

"In all cases the [Board of Prison Terms] ... shall, not later than one year after the commencement of the term of imprisonment, review the sentence and shall by motion recommend that the court recall the sentence ... and resentence the defendant ... if the board determines the sentence is disparate. The review under this section shall ... apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing." 33/

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32/ continued

lower terms respectively; it supplies rules for enhancement of this base term under certain circumstances, and for the computation of sentence in the event of conviction for more than one offense; and it requires the Judicial Council to "seek to promote uniformity of sentencing under Section 1170, by ... [t]he adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing ...," § 1170.3. The Rules cited above are promulgated pursuant to this requirement.

33/ Former Cal. Penal Code § 1170(f). The quoted

Pursuant to this mandate,

"[t]he Board has gathered information on the DSL [Determinate Sentencing Law] sentences imposed in this state. This information includes data on each DSL prisoner's criminal history, his social history, the circumstances of the offense, and the sentence itself.

Utilizing this information, the Board undertakes a three-step process to identify 'disparate' sentences. First, the Board identifies other cases to which the subject case is similar. Second, the Board uses statistical analysis to identify 'variant' cases; that is, cases that do not conform to an 'observed sentencing pattern' occurring within

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33/ continued

language is that enacted by 1 Cal. Stats. 1977, ch. 165, § 15, pages 647, 649, except that the "Board of Prison Terms" has been substituted for the agency previously involved. Amendments of the statute between 1979 and 1981 have changed it considerably, but not in any particular that is presently relevant. The current form appears as Penal Code § 1170(f) in the West 1983 cumulative pocket part.

Justice Kaus, in his Easley opinion (pages 36-41 supra), noted: "To my knowledge, neither Frierson, Jackson nor any other decision of this court has considered what effect -- if any -- the existence of this statutory procedure has on the question of proportionality review in capital cases." People v. Easley, supra, 654 P.2d at 1294 n.7, 187 Cal. Rptr. at 766 n.7.



the cases grouped as 'similar'. These variant cases are distinguished from 'nonvariant cases' (those cases which do conform to an observed sentencing pattern occurring within the cases grouped as similar). In the third step of the process, the variant cases are examined on a case by case basis to determine if there are other factors present in those cases (not taken into account in the original statistical analysis) that would explain or justify the more severe sentence. If no additional aggravating circumstances are identified, the Board, in its discretion, can find that the sentence is 'disparate' ..." (People v. Herrera, 127 Cal. App.3d 590, 597-598, 179 Cal. Rptr. 694, 698-699 (1982).)

\* \* \*

"The entire sentence review process is based on a data base of more than 37,000 cases reviewed by the end of 1982. The data base is carefully and extensively edited for accuracy. It contains detailed charging, conviction, and sentencing information, socioeconomic information about the offender, criminal justice system background information, and information about victims of crime. ..." (CALIFORNIA YOUTH AND ADULT CORRECTIONAL AGENCY, BOARD OF PRISON TERMS, REPORT ON SENTENCING PRACTICES -- DETERMINATE SENTENCING LAW, 5 (February 10, 1983).)

Surely, a State which has a procedure of this sort in place for the review of scores of thousands of non-capital sentences in the interest of uniformity of criminal punishment should not find it too "burdensome" to provide some means for proportionality review in the relative handful of cases where life is at stake.

The second answer to Pulley's complaint about the burdensomeness of the "factual review envisioned by the Ninth Circuit" (Pet. Br. 39) is that the Ninth Circuit's decision envisions no particular form of proportionality review of death sentences, leaving the questions of scope and method of review entirely to the California Supreme Court. See pages 48-50 supra. The California Supreme Court seems presently to be pondering those questions. See pages 36-42 supra. The review procedures which it may choose to adopt are not now foreseeable; to talk about their bur-

densomeness vel non beforehand is entirely rash and necessarily ill-informed. Both the Eighth Amendment and the Ninth Circuit give the California Supreme Court ample flexibility to design a mode of review which is within California's means and suitable to its particular needs.

All that proportionality review, as envisioned by the Ninth Circuit, means is some method of appellate review that "serves as a check against the random or arbitrary imposition of the death penalty," that "eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury," and that assures that, "[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, ... no defendant convicted under such circumstances will suffer a sentence of death." Gregg v. Georgia, supra, 428 U.S. at 206 (lead opinion). The standards

and processes of review to this end can be shaped by the California Supreme Court as it sees fit.

For that same reason, it would be utterly inappropriate for this Court to accept Pulley's invitation to make an independent determination of first impression that, "if the facts of [Harris'] ... case do not justify the death penalty, no case will." (Pet. Br. 47.) That judgment is within the initial province of the California Supreme Court, which has not yet undertaken to compare Harris' case with any other case, or to review the substantive fitness of Harris' death sentence in any way. See note 25 supra.<sup>34/</sup> Despite the "fact that this issue has

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<sup>34/</sup> Pulley implies doubt as to whether "any ... similar cases [to Harris'] can be found" (Pet. Br. 47). There is no doubt. The record herein contains no reference to such cases, because the district court below permitted no record to be made on this or any other issue in the case. See pages 9, 10-12, 47-48 supra. In Appendix B infra we set

proceeded through all available courts (some of them two and three times)" (Pet. Br. 15), the only judgments so far made as to the substantive propriety of a sentence of death for Robert Alton Harris were those made by his sentencing jury and trial judge. Those are not judgments which this Court should review in the first instance. Rather, as the Ninth Circuit correctly held, it is the constitutional obligation of the California Supreme Court to review them first.

#### CONCLUSION

The judgment below should be affirmed.

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34/ continued

out brief summaries of the facts of several aggravated multiple-murder cases in which the prosecution sought the death penalty but the sentencing jury or judge declined to impose it.

Respectfully submitted,

QUIN DENVIR

State Public Defender

CHARLES M. SEVILLA

Chief Deputy State Public Defender

EZRA HENDON

MICHAEL G. MILLMAN

ERIC S. MULTHAUP

Deputy State Public Defenders

MICHAEL J. McCABE

110 West C Street, Suite 2102

San Diego, California 92101

(619) 237-6552

ANTHONY G. AMSTERDAM

New York University Law School

40 Washington Square South

New York, New York 10012

(212) 598-2638

Attorneys for Respondent

## APPENDIX

## APPENDIX A

### PROPORTIONALITY REVIEW PROVISIONS OF STATE LAW

Unless otherwise noted, the following statutes or judicial decisions provide for appellate review of the proportionality of death sentences, including a comparison of the facts of the case at bar with others. In States where no statutory citation is set out below, proportionality review is the product of judicial decisions. Only the leading case in each jurisdiction is cited.

#### Alabama

Ala. Code § 13A-5-53 (1982)

#### Alaska

No death penalty

#### Arizona

State v. Richmond, 114 Ariz. 186,  
196, 560 P.2d 41, 51 (1976)



Arkansas

Collins v. State, 261 Ark. 195,  
221-222, 548 S.W.2d 106, 120-121  
(1977)

California

Sub judice

Colorado

The statute, Colo. Rev. Stat. Ann. §  
16-11-103(7)(a), (b) (1982 cum.  
pocket part) provides for review of  
the substantive propriety of each  
death sentence, but is silent on the  
subject of comparative methodology.  
See also Colo. Appellate Rule  
4(e)(1)(1982 cum. pocket part).  
The Colorado Supreme Court has not  
yet spoken to the issues of scope and  
method of review.

Connecticut

Conn. Gen. Stat. Ann. § 53a-46b(b)  
(1982 supp.)

Delaware

Del. Code Ann., tit. 11, § 4209(g)(2)  
(1979)

Florida

State v. Dixon, 283 So.2d 1, 10 (Fla.  
1973)

Georgia

Ga. Code Ann. § 17-10-35(e) (1982)

Hawaii

No death penalty

Idaho

Idaho Code Ann. § 19-2827(c) (1979)

Illinois

People v. Gleckler, 82 Ill.2d 145,  
161-171, 411 N.E.2d 849, 856-861  
(1980)

Indiana

Proportionality review is apparently  
limited to consideration of the facts  
of the case at bar, without compar-  
ison to other cases. Williams v.  
State, \_\_\_\_\_ Ind. \_\_\_\_\_, 430  
N.E.2d 759, 764-768 (1982).

Iowa

No death penalty

Kansas

No death penalty

Kentucky

Ky. Rev. Stat. Ann. § 532.075(3)  
(1982 cum. pocket part)

Louisiana

La. Sup. Ct. Rule 905.9.1, § 1,  
applicable to La. Code Crim. Pro.  
Ann., art. 905.9 (West 1982 cum.  
pocket part)

Maine

No death penalty

Maryland

Md. Code Ann., art. 27, § 414(e) (1982)

Massachusetts

Mass. Gen. Laws Ann., ch. 279, § 71  
(1982 cum.pocket part)

Michigan

No death penalty

Minnesota

No death penalty

Mississippi

Miss. Code Ann. § 99-19-105(3) (1982 cum.  
pocket part)

Missouri

Mo. Stat. Ann. § 565.014(3) (Vernon  
1979)

Montana

Mont. Code Ann. § 46-18-310 (1981)

Nebraska

Neb. Rev. Stat. Ann. §§ 29-2521.01(5),  
29-2521.03 (1979)

Nevada

Nev. Rev. Stat. § 177.055(2) (1981)

New Hampshire

N.H. Rev. Stat. Ann. § 630.5 (VII)  
(1981 supp.)

New Jersey

N.J. Stat. Ann. § 2C:11-3(e) (1982)

New Mexico

N.M. Stat. Ann. § 31-20A-4(C) (1981  
repl. pamphlet)

New York

No death penalty, except for a  
mandatory death sentence applicable  
to murder by a life-term inmate  
(presently under constitutional  
challenge)

North Carolina

N.C. Gen. Stat. Ann. § 15A-2000(d)(2)  
(1978)

North Dakota

No death penalty

Ohio

Ohio Rev. Code Ann. § 2929.05(A)  
(Page 1982)

Oklahoma

Okla. Stat. Ann., tit. 21, § 701.13(C)  
(1981)

Oregon

No death penalty

Pennsylvania

Pa. Stat. Ann., tit. 42, § 9711(h)(3)  
(Purdon 1982)

Rhode Island

No death penalty

South Carolina

S.C. Code Ann. § 16-3-25(C) (1982 supp.)

South Dakota

S.D. Codified Laws Ann. § 23A-27A-12  
(1979)

Tennessee

Tenn. Code Ann. § 39-2-205(c) (1982)

Texas

Roney v. State, 632 S.W.2d 598,  
601-603 (Tex. Crim. App. 1982) (see  
notes 27, 29 to the body of this  
brief)

Utah

The statute, Utah Code Ann. § 76-3-206(2)  
(1978), is silent on the subject of  
the scope of appellate review of death  
sentences. See also Utah Code Ann. §  
76-3-207(3) (1978). A general construc-  
tional provision of the penal code,  
Utah Code Ann. § 76-1-104(3) (1978),  
may support proportionality review.  
The Utah Supreme Court has appeared

Utah (continued)

to say that it considers claims of disproportionality, but its decisions must be considered ambiguous in this regard. See State v. Pierre, 572 P.2d 1338, 1355 (Utah 1977); State v. Wood, 648 P.2d 71, 77 (Utah 1982).

Vermont

Vermont's death-penalty statute, Vt. Stat. Ann., tit. 13, § 2303(c) (1982 cum. pocket part), predates Furman and has not been considered by the Supreme Court of Vermont since Furman. (It authorizes capital punishment only for the first-degree murder of correctional personnel.)

Virginia

Va. Code 1950 § 17-110.1(C) (1982 repl. vol.)

Washington

Wash. Rev. Code Ann. § 10.95.130(2) (1983 cum. pocket part)

West Virginia

No death penalty

Wisconsin

No death penalty

Wyoming

Wyo. Stat. Ann. § 6-2-103(d) (1983)

## APPENDIX B

### MULTIPLE-MURDER DEFENDANTS NOT SENTENCED TO DEATH

In the following California cases where first-degree murder and special circumstances were found, the prosecution asked for the death penalty but the sentencing jury or judge refused to impose it:

(1) Brown. Four-day crime spree including six burglaries, one involving the killing of the homeowner, another involving a forcible rape/oral-copulation/robbery, and finally a rape of an acquaintance in her home, on the floor next to her boyfriend's body, after the defendant had shot the boyfriend dead. Defense: smoking PCP throughout the four-day period. Prior aggravated assault and rape-murder in Wisconsin introduced at penalty phase. [Jury sentenced to life

without parole.] (People v. Leonard Brown, Los Angeles Cty. Super. Ct. No. A020840.)

(2) Caywood. Robbery-murder of gas station operator and employee, both killed by short-range shots to the back of the head. Defendant also worked at the station. Prior Illinois robbery and California involuntary manslaughter (defendant overdosed victim and then dumped body in the woods) introduced at penalty phase. [Jury hung on penalty; parties stipulated that judge should then determine penalty; judge sentenced to life without parole.] (People v. William Caywood, Orange Cty. Super. Ct. No. C45603.)

(3) Jordan. Three separate multiple-robbery incidents culminating in a double murder during the last robbery. Defendant had served a prison term for assault with



a deadly weapon. [Two successive juries hung on penalty; judge then sentenced to life without parole under Briggs Initiative.] (People v. Kenneth Jordan, Los Angeles Super. Ct. No. A357550.)

(4) Marler. Killing of gas station attendant while the defendant was a fugitive following two Washington State murders of persons related to the defendant's girlfriend. The Washington murders and an "extensive criminal record" including assault and theft convictions were considered by the sentencing judge. [Judge sentenced to life without parole.] (People v. Clyde Marler, Shasta Cty. Super. Ct. No. 67324.)

(5) Matlock. Four-day crime spree including four robbery-murders (of two used car lot employees, a pharmacy employee, and a restaurant owner shot execution-style), as well as the non-fatal

shooting of another street-robbery victim in the back of the head. Extensive criminal record: multiple theft arrests since age 11 (defendant was 23 at the time of the murders), adult prison term for assault with a deadly weapon, escape, robbery. Defendant had been released from prison 3-1/2 months before the subject crime spree. [Jury sentenced to life without parole.] (People v. Mark Matlock, Los Angeles Cty. Super. Ct. No. A338952.)

(6) Roberts. Burglary murder of homeowner and his daughter, for whom defendant had previously done yard work. Defendant stalked the victims at their house for some time prior to the killings, with the intention of killing them. After shooting the daughter, the defendant "spontaneously" committed necrophilia. Defendant admitted another homicide

to police. [Jury hung on penalty; judge then sentenced to life without parole under 1977 statute.] (People v. Paul Roberts, San Bernardino Cty. Super. Ct. No. SCR 35302.)

(7) Thomas. Execution-style murders of four people, including a 2-year-old girl, apparently in retaliation for a slight received in a family feud. Prior prison term for armed robbery. Mitigation: excellent work record in the recent past; two codefendants also spared the death penalty. [Jury sentenced to life without parole.] (People v. Willie Thomas, Los Angeles Cty. Super. Ct. No. A018108.)

(8) White. Three separate killings, all related to narcotics sales. Extensive criminal record including a number of prior felonies (none violent). [Jury sentenced to life without parole.] (People v. Freddie White, Alameda Cty. Super. Ct. Nos. 68512, 68513.)

(9) Zimmerman. Axe murders of 18-year-old boy and his 12-year-old sister during a burglary. The girl was raped and sodomized. Prior burglary conviction. [Jury hung on penalty; judge then sentenced to life without parole under 1977 statute.] (People v. John Zimmerman, Los Angeles Cty. Super. Ct. No. A077363.)

## APPENDIX C

### EXCERPTS FROM FORMER CALIFORNIA

#### PENAL CODE §§ 190 - 190.4

##### Penal Code § 190

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.

##### Penal Code § 190.1

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

Penal Code § 190.2

190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victims's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.



(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

Penal Code § 190.3

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. ...

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects [sic] of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

Penal Code § 190.4

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

. . . . .

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

. . . . .

(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples [sic] appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

. . . . .

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NO. 82-1095  
IN THE SUPREME COURT  
OF THE UNITED STATES  
October Term 1983

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R. PULLEY, Warden of the California  
State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

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REPLY BRIEF

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JOHN K. VAN DE KAMP,  
Attorney General of the  
State of California

HARLEY D. MAYFIELD,  
Assistant Attorney General

MICHAEL D. WELLINGTON,  
Deputy Attorney General

Attorneys for Petitioner

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PETITION FOR CERTIORARI FILED DEC. 19, 1982  
CERTIORARI GRANTED MARCH 21, 1983

TOPICAL INDEX

	<u>Pages</u>
ARGUMENT	1 - 34
I INTRODUCTION - A MORE SHARPLY DEFINED STATE- MENT OF THE ISSUES AND SUMMARY OF ARGUMENT	1 - 7
A. Proportionality	2 - 3
B. Review	3 - 5
C. The California Supreme Court Has Spoken Clearly and Conclusively Both on Proportionality Review and on the Disposition of the Present Case	5 - 7
II THE "PROPORTIONALITY REVIEW" ISSUE IS QUITE PROPERLY BEFORE THIS COURT AND SHOULD BE ADDRESSED	8 - 15
A. The California Supreme Court Has Established and Defined the California Constitution's Proportionality Requirements	8 - 12



TOPICAL INDEX  
(continued)

	<u>Pages</u>
B. Harris Has Not Been Denied the Opportunity to Present His Proportionality Arguments	12 - 15
III PROPORTIONALITY ANALYSIS DOES NOT REQUIRE DETAILED COMPARISON OF EACH CAPITAL CASE WITH EVERY OTHER CAPITAL- ELIGIBLE CASE IN THE STATE	16 - 28
IV REVIEW OF PROPOR- TIONALITY REQUIRES NO SPECIAL PROCEEDING AND IS NOT MANDATORY IN EVERY CASE	29 - 32
V CALIFORNIA'S PROCEDURES HAVE SATISFIED THE UNITED STATES CONSTITUTION	33 - 34
CONCLUSION	35

TABLE OF AUTHORITIES

CASES	<u>Pages</u>
Barclay v. Florida <u>U.S.</u> (July 6, 1983) 51 U.S.L.Week 5206	26-28
Boykin v. Alabama (1969) 395 U.S. 238	31
Coker v. Georgia (1976) 433 U.S. 584	18
Enmund v. Florida <u>U.S.</u> (July 2, 1982) 50 U.S.L.Week 5087	18
In re Lynch (1972) 8 Cal.3d 410	6, 9, 21
People v. Dillon (1983) 34 Cal.3d 441	34
People v. Easley (1982) 33 Cal.3d 65	11
People v. Frierson (1979) 25 Cal.3d 142	6, 9, 10, 21
People v. Jackson (1980) 28 Cal.3d 264	10, 11
Roberts v. Louisiana (1976) 428 U.S. 325	24
Solem v. Helm <u>U.S.</u> (June 28, 1983) 51 U.S.L.Week 5019	3, et passim

TABLE OF AUTHORITIES  
(continued)

CASES	<u>Pages</u>
Witherspoon v. Illinois (1968) 391 U.S. 510	26
Woodson v. North Carolina (1976) 428 U.S. 280	24, 25-26, 32
STATUTES	
California Penal Code, § 1239	32
CONSTITUTIONS	
United States Constitution, Eighth Amendment	30

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REPLY BRIEF

ARGUMENT

I

INTRODUCTION - A MORE  
SHARPLY DEFINED STATE-  
MENT OF THE ISSUES AND  
SUMMARY OF ARGUMENT

With the filing of the briefs  
on the merits in this case, it is now far  
more clear where the parties agree and  
where they diverge.

/

Petitioner and respondent agree that death judgments must be proportional. We disagree, however, on what constitutes proportionality. Further, we agree that capital defendants have the right to challenge what they perceive as a lack of proportionality in their death judgments, but we disagree on precisely how the issue is to be raised and addressed. In other words, the issues are; (1) what is "proportionality", and (2) what kind of "review" is required.

A. Proportionality

Harris, amicus curiae, and the Ninth Circuit envision proportionality as a "comparative review." Under their view all circumstances in each death judgment case must be compared with all the circumstances in every other case in which the sentencing authority was presented with the opportunity to enter a death

judgment. Then the question would be whether the instant defendant received a death judgment while others no less deserving of execution were spared.

To the contrary, we contend that this Court clearly and conclusively defined "proportionality" at the end of last term in Solem v. Helm \_\_\_\_ U.S. \_\_\_\_ (June 28, 1983) 51 U.S.L.Week 5019). Relying on century-old constitutional principles, this Court in Helm established a clear three-step constitutional proportionality analysis which involves an examination of broad classes of conduct to determine, in general, whether the proposed punishment is disproportionate for that class of conduct.

B. Review

Harris, amicus curiae, and the Ninth Circuit urge that proportionality must be reviewed mandatorily by the

state's highest court irrespective of whether the issue is raised by the parties and even though, on the facts of a particular case, the issue would be frivolous even if raised. Further, it is urged that the review must be expressly acknowledged by the state's highest court with findings and conclusions reported in each case.

We urge that proportionality is no different than any other constitutional issue. It is one which may be raised by the defendant who must then demonstrate the violation he alleges. Only then need it be examined by the courts. It could be raised in the trial court and on direct appeal. The issue can also be raised on state habeas corpus or federal habeas corpus. No specially designed separate review process is

constitutionally necessary, nor is review invariably mandatory.

C. The California Supreme Court Has Spoken Clearly and Conclusively Both on Proportionality Review and on the Disposition of the Present Case.

Harris' position on the above issues has given rise to a confusion on his part as to whether the California Supreme Court has formulated its position on proportionality review and whether that court has reached a final disposition of Harris' case.

Because of this, Harris argues that this Court should not decide the proportionality review issue until California has completed setting up its proportionality review system. Furthermore, he argues that the California Supreme Court has established his right to proportionality review under state law



but has denied it to him in violation of federal due process guaranties.

California's position on proportionality is clearly settled. In 1979 (prior to Harris' Supreme Court appeal) the California Supreme Court announced that long-established state law proportionality principles are available to capitally sentenced defendants. (People v. Frierson (1979) 25 Cal.3d 142, 183; In re Lynch (1972) 8 Cal.3d 410, 425-427.) Furthermore, these long-established California proportionality principles are based on precisely the same three-step proportionality analysis this Court announced last term. (Solem v. Helm, supra, 51 U.S.L.Week at p. 5023.) Thus, both the California Supreme Court and this Court have spoken conclusively on the issue, and they have spoken with one voice.

It is obvious then that California has not denied Harris the opportunity to raise this issue. He has had innumerable opportunities to raise it and has chosen not to because, as to him, it would be patently frivolous.

Therefore, the California Supreme Court has clearly reached a final disposition as to Harris. First the California Supreme Court affirmed his death judgment on direct appeal. Then, that court denied his petition for habeas corpus in an order which also vacated the previously granted stay of execution. Except for the possibility of executive clemency, California is through with Mr. Harris and is ready for the judgment to be executed.

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II

THE "PROPORTIONALITY  
REVIEW" ISSUE IS QUITE  
PROPERLY BEFORE THIS  
COURT AND SHOULD BE  
ADDRESSED

A. The California Supreme  
Court Has Established and  
Defined the California  
Constitution's Proportional-  
ity Requirements.

After spending the last five years (including three petitions to this Court) complaining about the lack of proportionality review in his case, Harris is finally before this Court with an opportunity to argue his issue. Ironically, in the face of this, Harris spends about half of his brief arguing that this Court should not even decide the issue.

First, he argues that the California Supreme Court is still formulating its approach to proportionality review and that it would be inappropriate

for this Court to decide the issue before California has had a shot at it. This is preposterous.

The issue was decided in California in People v. Frierson, supra, 25 Cal.3d 142. In Frierson the California Supreme Court declared the death penalty statute involved in this case to be constitutional. In the face of an argument that proportionality review was required, and lacking, the court expressed its doubt that "proportionality review" as a specific, separate entity, was constitutionally required. (People v. Frierson, supra, at p. 181.) However, the court strongly and expressly reaffirmed, "well-established proportionality principles of general application" under the State Constitution, citing its own landmark case, In re Lynch, supra, 8 Cal.3d 410. Detailing the precise

contours of such a proportionality analysis the court said:

"In determining disproportionality under Lynch, we examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (8 Cal.3d at p. 425.) In addition, we ascertain whether more serious crimes are punished in this state less severely than the offense in question. If so, 'the challenged penalty is to that extent suspect.' (Id., at p. 426.) Finally, under Lynch we compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having identical or similar constitutional provisions regarding cruel and/or unusual punishment. (Id., at p. 427.)" (People v. Frierson, supra, 25 Cal.3d at p. 183.)

This clear statement in Frierson was reaffirmed the following year in People v. Jackson (1980) 28 Cal.3d 264, 317, wherein the California Supreme Court made it clear that the Lynch test was

California's standard for proportionality analysis.<sup>1/</sup>

Harris makes much out of a dialogue between Justice Kaus and Chief Justice Bird in their separate concurring and dissenting (and now vacated) opinions in People v. Easley (1982) 33 Cal.3d 65 (decision on rehearing pending). This dialogue is irrelevant to the issue now before this Court. At the most, those vacated separate opinions suggest that two out of seven justices are not sure they agree with the clear majority of the Court. This is of no consequence. As

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1. At the same time the California Supreme Court indicated it was "fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated," by this Court. (People v. Jackson, supra, 28 Cal.3d at p. 317.) This Court last term did define "proportionality" using precisely the same three-part test California uses under Lynch, Frierson, and Jackson. (Solem v. Helm, supra, 51 U.S.L.Week at p. 5023.)

demonstrated above, a majority of the California Supreme Court has spoken clearly and conclusively on the point. That constitutes California's law on the subject.

B. Harris Has Not Been Denied the Opportunity to Present His Proportionality Arguments.

Harris also urges that in Frierson and Jackson the California Supreme Court established his right to a proportionality review, but has denied him that review. Thus he urges this denial of a "state created right" violates federal due process principles.

He is wrong on two grounds. First, as has been demonstrated, the California Supreme Court did not establish a right to a particular form of proportionality review. Rather, it established Harris' right to raise the issue of proportionality if he chooses.

Second, he has not been denied the opportunity to raise the issue. He has simply not taken the opportunity because, as to him, the issue would be a frivolous one.

Lynch was established California law six years before appellant committed his crime. Frierson reaffirmed Lynch's applicability to death judgments in ample time for that case to be discussed on Harris' direct appeal. In fact, Frierson was addressed by Harris on direct appeal, but only to dispute its conclusion that California's statute was constitutional. Harris made no effort to avail himself of the proportionality analysis that had been offered him in Frierson.

On state habeas corpus Harris made "boilerplate" conclusory allegations that the death penalty had been imposed on him under circumstances,



" . . . no more deserving of the death penalty under any legitimate penological justification for capital punishment than are the many death-eligible defendants on whom the death penalty is not imposed." (Harris Petition for Writ of Habeas Corpus, California Supreme Court, CRIM. 22380, p. 4.)

However, these bare conclusions were not supported by any specific factual allegations, nor do they relate to the specific three-part test which had been offered to Harris in Lynch and Frierson. Furthermore, there was no Lynch/Frierson proportionality analysis presented in his state habeas corpus petition.

In his brief Harris complains that he is, "entitled to know whether [proportionality review] exists, and what it is, so he can resort to it before being put to death." (Brief for Respondent, p. 55.) This comment is, at best, disingenuous. California had made the standards for any proportionality argument crystal

clear to Mr. Harris. He has chosen, to date, not to avail himself of such an argument for the obvious reason that on the facts of this case he has no valid position to take which would entitle him to any relief.

It is thus not only proper but necessary for this Court to address the merits of the Ninth Circuit's ruling on the issue of "proportionality review." California law is fully and clearly formed on the matter, and is precisely the same as this Court's pronouncements under the Federal Constitution. Furthermore, the California courts are through with Mr. Harris. His judgment has been affirmed on direct appeal, his habeas corpus petitions have been denied, and his stay of execution has been vacated. His only remaining opportunities for judicial relief are in the federal system.

III

PROPORTIONALITY ANALYSIS  
DOES NOT REQUIRE DETAILED  
COMPARISON OF EACH CAPITAL  
CASE WITH EVERY OTHER  
CAPITAL-ELIGIBLE CASE IN  
THE STATE

Harris, amicus curiae, and the Ninth Circuit all share a common misconception of the scope of a proportionality analysis under the Federal Constitution. The assumption is that such an analysis requires all aggravating and mitigating factors in each case to be compared with the aggravating and mitigating factors in all other cases which could have resulted in the death penalty to determine whether the defendant in question has been sentenced to die while others no less deserving of death have been spared. There are three things wrong with this. First, it is directly contrary to recent decisions of this Court. Second, it

would present an unworkable administrative nightmare to the states. Third, it would work an unacceptable intrusion on the constitutionally favored role of the jury in expressing contemporary community values.

At the end of last term this Court took the opportunity to declare the specific requirements under a federal constitutional proportionality analysis. In Solem v. Helm, supra, 51 U.S.L. Week 5019, this Court reaffirmed the principle that the Eighth Amendment to the Federal Constitution, "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." (Id., at p. 5021.) And that, "the constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." (Id., at p. 5022.)

Synthesizing the analyses of its previous cases this Court announced the establishment of a clear three-step test for proportionality analysis, holding:

"In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (Solem v. Helm, supra, 51 U.S.L. Week at p. 5023.)

From the analysis in Helm, it is apparent that the newly announced three-part test was at work in this Court's previous decisions in Coker v. Georgia (1976) 433 U.S. 584 and Enmund v. Florida \_\_\_\_ U.S. \_\_\_\_ (July 2, 1982) 50 U.S.L. Week 5087). In Coker, this Court concluded that proportionality

principles precluded the imposition of the death penalty for the rape of an adult woman. In Enmund this Court concluded that proportionality principles precluded the death penalty for one convicted of murder but who did not personally kill and who did not intend death to occur. In Helm it was held that proportionality principles precluded a life sentence for one who passed a one hundred dollar bad check.

It is clear from a reading of Coker, Enmund, and Helm that a proportionality analysis does not require a complicated evidentiary proceeding in which all of the circumstances underlying each death sentence are compared with all of the circumstances underlying every other case where death was at issue. No comparative reweighing of the aggravating and mitigating factors is necessary at

all. Rather, proportionality analysis involves a much broader and more abstract issue in which broad classes of conduct (i.e. rape, murder by one who neither killed nor intended death, passing a bad check) are examined. The question under such an analysis is whether the proposed punishment is shockingly overharsh, or whether legislatures, juries, and courts have so overwhelmingly refused to impose the proposed penalty that an almost universal repudiation of it is evident.

This point was made explicit in the majority opinion in Helm.

"Contrary to the dissent's suggestions, post, at 2, 12, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides

only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." (Solem v. Helm, supra, 51 U.S.L. Week at p. 5023, fn. 16.)

We have noted that the proportionality analysis established in Helm is precisely the same analysis established under the California Constitution in In re Lynch, supra, 8 Cal.3d 410, and People v. Frierson, supra, 25 Cal.3d 142. We have also noted that Harris has raised no arguments under the Lynch/Frierson/Helm analysis because that analysis would clearly entitle him to no relief whatsoever. In this regard it should be noted that Harris was only six months out on parole from a previous personally committed homicide when he kidnapped and



robbed two teen age boys whom he personally and cold-bloodedly executed. After the boys were dead he fired an additional, unnecessary bullet into one boy's head at point-blank range just to see what it would be like, and then sat, down and finished the boys' unfinished breakfast of hamburgers, laughing at his younger brother for not having the stomach to do the same.

Without necessity of any further reference to the additional grisly circumstances of Harris' crime and record this Court could and should rule as a matter of law that death for such conduct is not disproportionate. It would seem undeniable, given the constitutionality of capital punishment in the abstract, that such intentional and multiple murders are fully supportive of a death judgment. Furthermore, it has

not, and cannot be shown that either an overwhelming majority or even a significant minority of legislatures, courts, or juries in states with capital punishment have acted to repudiate death as a punishment for such crimes. It is for this reason that we have repeatedly said that if capital punishment is constitutional as to anyone, it is as to Robert Harris.

Not only is Harris' vision of proportionality inconsistent with this Court's settled case law, it would be an utterly unworkable one which would improperly invade the jury's traditional role.

The jury's judgment in a death penalty case is a deeply spiritual and subjective expression of contemporary community values. It was for this very reason that this Court disapproved

mandatory death penalty systems in Woodson v. North Carolina (1976) 428 U.S. 280, and Roberts v. Louisiana (1976) 428 U.S. 325. As anyone familiar with capital cases is aware, the variations in aggravating and mitigating circumstances in such cases are infinite and simply not subject to the mechanical quantification expressly envisioned by amicus curiae. (Brief of Amicus Curiae, pp. 40-41.) The facts of each case are unique and, in the context of a constitutionally drawn death penalty statute, must simply be commended to the judgment of the sentencing authority. Although that authority operates within broad constitutional limits, it must have wide latitude within those limits to weigh the value of each of the unique factors in a case and synthesize all those individual value judgments into the ultimate judgment on sentence.

The fact that one jury might decide a case differently than another is a historic and invariable fact of our proudly human system. So too, the fact that a judge or court might have voted a different sentence in a particular case is of no moment so long as the judgment is not completely beyond the limits of the Constitution.

Any judicial proportionality review that attempts to reweigh all the factors of one unique case presented to one jury and compare those to all the factors in a different unique case presented to a different jury can only be an invitation for the courts to usurp the jury's traditional role, "to maintain a link between contemporary community values and the penal system." (Woodson v. North Carolina, supra, 428 U.S. at

p. 295, quoting Witherspoon v. Illinois (1968) 391 U.S. 510.)

Although the historic actions of juries in death penalty cases may be relevant on the issue of proportionality, this is only so to the extent that history demonstrates a virtual repudiation of the death penalty as to the broad class of conduct at issue. This Court clearly expressed these same concerns late last term in the majority opinion in Barclay v. Florida \_\_\_\_ U.S. \_\_\_\_ (July 6, 1983) 51 U.S.L.Week 5206.)

"Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Lant v. Stephens, \_\_\_\_ U.S. \_\_\_\_, 11

(1983), quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Steward, Powell, and Stevens, JJ.). This very Term we said in another capital case:

"In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment.' California v. Ramos, \_\_\_\_ U.S. \_\_\_\_, 14 (1983).

"We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably

do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see Proffitt v. Florida, 428 U.S. 242 (1976), and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more." (Barclay v. Florida, supra, \_\_\_\_ U.S. \_\_\_\_ (51 U.S.L.Week at p. 5209.)

It is thus clear that proportionality does not and could not involve the sort of specific comparative review Harris urges. Also, although he does not and has not urged it, it is clear that a proper proportionality analysis could not lead to the conclusion that his sentence is disproportionate.

/

/

IV

REVIEW OF PROPORTIONALITY  
REQUIRES NO SPECIAL  
PROCEEDING AND IS NOT  
MANDATORY IN EVERY CASE

The other major area of disagreement between the parties centers around the form that review of proportionality must take. Harris, amicus curiae, and the Ninth Circuit envision a review that must be conducted by the state's highest court in every case whether or not the issue is raised by the parties or the facts. Further, it is implicitly held by the Ninth Circuit that the state's highest court must acknowledge, on the record, that it has done such a review and must detail its conclusions.

This makes no sense whatsoever. Proportionality is no different than any other constitutional issue. If the facts



of the case present the issue the parties can raise it and the courts can rule on it.

Harris relies heavily on this Court's previous rulings expressing concern that state death judgments be made, "rationally reviewable." From this he concludes, "It would be a remarkable Eighth Amendment that required 'reviewability' without requiring review."  
(Brief for Respondent, p. 67.)

Not so. Certainly the issue of proportionality is of no more fundamental concern than the voluntariness of confessions. Yet we are aware of no cases requiring the state's highest court to review the voluntariness of confessions in the absence of issues raised and supportive facts offered. Furthermore, this Court has in the past based constitutional holdings on the need for

reviewability without attaching an invariable obligation of review.

For example in Boykin v. Alabama (1969) 395 U.S. 238, this Court noted that a plea of guilty is even, "more than a confession," and required specific on the record procedures for the taking of the waivers of constitutional rights involved in a plea of guilty. The express purpose of this requirement was so that waivers could be properly reviewed. Yet there has been no concomittant requirement that review invariably follow in each case. As with other constitutional issues such as proportionality, such review is to be had if the issue is raised based on supportive facts.

To make any such review of proportionality automatically mandatory would be wasteful and far better designed

to make the death penalty too cumbersome to work than to insure proportionality. The standards of proportionality are clearly enunciated both in California and under the Federal Constitution. It is enough that a defendant be given the opportunity to raise the issue if he chooses and if he can make a colorable argument. If the state courts decide the issue incorrectly, as was done in Coker, Enmund, and Helm, the federal courts are always available for further review.<sup>2/</sup>

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2. Harris also argues that this Court's decisions make "meaningful appellate review" an Eighth Amendment necessity. (Brief for Respondent, p. 71.) No majority of this Court has so held. In fact it has been an unchallenged part of this Court's death penalty debate that "there is no right to appellate review of a criminal sentence. McKane v. Durston, 153 U.S. 684 (1894)." (Woodson v. North Carolina, *supra*, 428 U.S. at p. 316 (dis. opn. of Rehnquist, Jr.)) This case, however, does not raise that issue since California agrees with Harris on the importance of "meaningful appellate review" and provides it automatically by statute. (Cal. Pen. Code, § 1239.)

v

CALIFORNIA'S PROCEDURES  
HAVE SATISFIED THE UNITED  
STATES CONSTITUTION

California's proportionality principles are clear and well established. They are precisely those announced by this Court under the Federal Constitution. Harris could have raised arguments based on these principles in the trial court, on direct appeal, or on state habeas corpus. He did not, presumably because established proportionality principles could not possibly have gained him any relief.<sup>3/</sup>

---

3. It is clear that proportionality review is a present reality in California and Harris has no argument available that California courts do not implement the proportionality review established over a decade ago in In re Lynch.

In September of this year the California Supreme Court, relying on In re Lynch, Enmund v. Florida, and Solem v. Helm once again applied the three-part

It is for this reason we have repeatedly said Robert Harris has had all the proportionality review to which he is entitled.

\* \* \*

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Footnote 3 continued:

proportionality analysis to reduce a first-degree murder conviction obtained under the felony murder rule, to a second degree murder conviction. (People v. Dillon (1983) 34 Cal.3d 441, 477-489.)

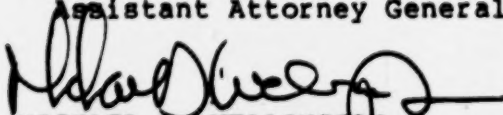
CONCLUSION

For the foregoing reasons petitioner respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP,  
Attorney General of the  
State of California

HARLEY D. MAYFIELD,  
Assistant Attorney General



MICHAEL D. WELLINGTON,  
Deputy Attorney General

Attorneys for Petitioner

**AFFIDAVIT OF SERVICE BY MAIL**

**Attorney:**

**No: 82-1095**

**JORN K. VAN DE KAMP**  
Attorney General of  
the State of California  
**MICHAEL D. WELLINGTON,**  
Deputy Attorney General

**R. PULLEY,**  
Petitioner,

**v.**

**ROBERT ALTON HARRIS,**  
Respondent.

110 West A Street, Suite 700  
San Diego, California 92101

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Quin Denvir  
State Public Defender  
1390 Market St., Ste. 425  
San Francisco, CA 94102  
Attn: Charles Sevilla

California Supreme Court  
350 McAllister St., Rm. 4050  
San Francisco, CA 94102

Anthony G. Amsterdam  
N.Y. Univ. Sch. Law  
40 Washington Square South  
New York, New York 10012

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Edwin L. Miller  
District Attorney, San Diego County  
Post Office Box X-1011  
San Diego, CA 92112

U.S. Court of Appeals, Ninth Circuit  
P. O. Box 547  
San Francisco, CA 94101

Charles A. Pulaski, Jr.  
Arizona State Univ., College of Law  
Tempe, Arizona 85287

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There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 25, 1983.

CLIFFORD E. REED, JR.

Subscribed and sworn to before me  
this 25<sup>th</sup> day of October, 1983.

Notary Public in and for said County and State

MOTION FILED  
JUL 22 1983

No. 82-1095

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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R. PULLEY, Warden of the California  
State Prison at San Quentin,

*Petitioner,*

v.

ROBERT ALTON HARRIS,

*Respondent.*

---

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS*  
*CURIAE* AND BRIEF OF THE NATIONAL COUNCIL  
ON CRIME AND DELINQUENCY AS *AMICUS CURIAE*  
IN SUPPORT OF AFFIRMANCE**

---

CHARLES A. PULASKI, JR.  
Arizona State University  
College of Law  
Tempe, Arizona 85287  
(602) 965-6463

*Counsel for Amicus Curiae  
The National Council on  
Crime and Delinquency*

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE .....	vi
STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
QUESTIONS PRESENTED .....	2
SUMMARY OF ARGUMENT .....	2
ARGUMENT	
I.    UNLESS A STATE'S DEATH SENTENCING PROCEDURE INCLUDES SATISFACTORY ALTERNATE SAFEGUARDS, PROPORTION- ALITY REVIEW IS CONSTITUTIONALLY REQUIRED IN DEATH PENALTY CASES .....	3
II.   UNDER CALIFORNIA'S DEATH-SENTENCING STATUTE, INDIVIDUAL JURIES EXERCISE SUBSTANTIAL DISCRETION, MAKING COM- PARATIVE SENTENCE REVIEW BY THE STATE SUPREME COURT A CONSTITUTIONAL PREREQUISITE .....	14
III.  THIS COURT SHOULD IDENTIFY AS THE CONSTITUTIONALLY ESSENTIAL FEATURES OF COMPARATIVE SENTENCE REVIEW THE REQUIREMENT THAT REVIEWING COURTS MUST CONSIDER MITIGATING FACTORS WHEN SELECTING "SIMILAR" CASES AND THAT THE FREQUENCY WITH WHICH FACTUALLY INDISTINGUISHABLE DEPENDANTS RECEIVE LIFE SENTENCES SHOULD GOVERN THE DETERMINATION OF EVENHANDEDNESS .....	26
CONCLUSION .....	42

# TABLE OF AUTHORITIES

## Page

### TABLE OF CASES

Barclay v. Florida, <u>U.S.</u> , 51 U.S.L.W. 5206 (No. 81-6908, July 6, 1983) .....	20,21
Beck v. Alabama, 447 U.S. 625 (1980) .....	6
California v. Ramos, <u>U.S.</u> , 51 U.S.L.W. 5220 (No. 81-1893, July 6, 1983) .....	19,25
Eddings v. Oklahoma, 455 U.S. 104 (1982) .....	39
Furman v. Georgia, 408 U.S. 238 (1972) .....	4,7,11,20,38
Gardner v. Florida, 430 U.S. 349 (1977) .....	6,31,34
Godfrey v. Georgia, 446 U.S. 420 (1980) .....	4,26,36
Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983) .....	36
Gregg v. Georgia, 428 U.S. 153 (1976) .....	3,5,6,10,11,20, 31,35,36,37
Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982) .....	viii,17,25
Jurek v. Texas, 428 U.S. 262 (1976) .....	6,9

	<u>Page</u>
Lockett v. Ohio, 438 U.S. 586 (1978) .....	5,6,39
McGautha v. California, 402 U.S. 183 (1971) .....	19
Proffitt v. Florida, 428 U.S. 242 (1976) .....	3,6-7,9,10,19,35
Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) .....	3,5
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) .....	7,13
Robinson v. California, 370 U.S. 660 (1962) .....	34
Williams v. Maggio, 679 P.2d 381 (5th Cir. 1982), <u>cert. denied</u> , U.S. ___, 51 U.S.L.W. 3920 (No. 82-5868, June 27, 1983) .....	33
Woodson v. North Carolina, 428 U.S. 280 (1976) .....	7,13
Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (No. 81-89, June 22, 1983) .....	4,5,6,10,35
Zant v. Stephens, 456 U.S. 410 (1982) .....	2

#### STATUTES AND RULES

Cal. Penal Code § 190.1(a) (1977) ...	16
Cal. Penal Code § 190.1(b) (1977)....	16
Cal. Penal Code § 190.3 (1977) .....	16

	<u>Page</u>
Cal. Penal Code § 190.4(e) (1977) ...	17
Fla. Stat. Ann. § 921.141(3) .....	23
Ga. Code Ann. § 26-3102 .....	10
Ga. Code Ann. § 27-2534.1(c) .....	10
La. S.Ct. R. 28(1)(c) .....	33
Tex. Code Crim. Proc. Ann. Art. 37.071 .....	8
Tex. Code Crim. Proc. Ann. Art. 37.071b .....	8

#### OTHER AUTHORITIES

2 AMERICAN LAW INST., MODEL PENAL CODE AND COMM., Art. 210.6 (1980) .....	18
Baldus, Pulaski, Woodworth, and Kyle, <u>Identifying Comparatively Ex-</u> <u>cessive Sentences of Death: A</u> <u>Quantitative Approach</u> , 33 STAN. L. REV. 1 (1980) .....	32
Bowers and Pierce, <u>Arbitrariness and</u> <u>Discrimination Under Post-Furman</u> <u>Capital Statutes</u> , 26 CRIME AND DELINQ. October 1980) .....	9, 34
Dix, <u>Administration of the Texas</u> <u>Death Penalty Statutes: Consti-</u> <u>tutional Infirmities Related to</u> <u>the Prediction of Dangerousness</u> , 55 TEXAS L. REV. 1343 (1977) ...	9
Dix, <u>Appellate Review of the Decision</u> <u>to Impose Death</u> , 68 GEO. L.J. 97 (1979) .....	9

No. 82-1095

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

\*\*\*\*\*

R. PULLEY, Warden of the California  
State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

\*\*\*\*\*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE IN SUPPORT OF RESPONDENT

\*\*\*\*\*

INTEREST OF THE NATIONAL COUNCIL ON CRIME AND  
DELINQUENCY AS AMICUS CURIAE

\*\*\*\*\*

The National Council on Crime and  
Delinquency is a non-profit organization  
which combines research, public education,  
and professional assistance to prevent  
crime and to ensure rational responses to

it. Supported by individual and corporate contributions, income from publications and dues, and foundation and government grants, NCCD is an independent voice seeking to influence policy, to inform opinion, and to shape practice.

NCCD maintains a regular program of research, information, and technical assistance. Currently underway are major studies of parole, probation, jail conditions, juvenile courts, and rape. NCCD published two quarterly journals, Crime and Delinquency and the Journal of Research in Crime and Delinquency, and a bi-weekly newsletter. The organization maintains a 50,000-item library and regularly advises state and local policy-makers and citizen groups on various criminal justice issues.

NCCD also conducts special projects, issues occasional publications and concentrates on currently pressing issues. NCCD

has become the leading repository of empirical analysis of the effect of the death penalty. A special issue on Crime and Delinquency (October 1980) presented some of the most recent research, and the organization recently published an up-to-date review of the literature available on the subject. See S. DIKE, CAPITAL PUNISHMENT IN THE UNITED STATES; A CONSIDERATION OF THE EVIDENCE (1982).

QUESTION OF LAW NOT ADEQUATELY PRESENTED

The National Council on Crime and Delinquency seeks to file the attached brief as Amicus Curiae in support of Respondent because of the important questions involved in the grant of certiorari. The constitutional necessity for proportionality review emerged as a primary factor in this litigation only as a result of the Court of Appeals' decision to grant habeas corpus relief to the Respondent on

that basis. Harris v. Pulley, 692 F.2d 1189, 1196-97 (9th Cir. 1982)(per curiam). Furthermore, the petition for certiorari invites this Court to decide the constitutional necessity for proportionality review in terms of an absolute, per se rule, an approach which the attached brief contends is fundamentally misleading. How this Court decides the questions presented by the Petitioner will govern the future operation of not only California's death-sentencing statute, but those of numerous other states. Consequently, it is essential that this Court consider the interests of others besides those of the parties to this litigation. The attached brief evaluates the constitutional necessity for proportionality review from such a perspective. It also identifies the basic components of the comparative sentence review process which must be present if that



process is to be capable of providing the safeguards required by Furman v. Georgia.

COMPLIANCE WITH RULE 36.3

Pursuant to Supreme Court Rule 36.3, counsel for the National Council on Crime and Delinquency as Amicus Curiae has attempted to obtain from the parties written consent to the submission of the attached brief. However, during a telephone conversation on June 13, 1983, Deputy Attorney General Michael D. Wellington, Counsel for Petitioner, stated that consent to amicus curiae briefs would not be forthcoming. For that reason, the National Council on Crime and Delinquency has submitted this motion.

Respectfully submitted,

CHARLES A. PULASKI, JR.  
Arizona State University  
College of Law  
Tempe, Arizona 85287  
( 6 0 2 ) 9 6 5 - 6 4 6 3

COUNSEL FOR AMICUS CURIAE  
The National Council on  
Crime and Delinquency

No. 82-1095

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

=====

R. PULLEY, Warden of the California  
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ROBERT ALTON HARRIS,

Respondent.

=====

BRIEF OF THE NATIONAL COUNCIL ON CRIME  
AND DELINQUENCY AS AMICUS CURIAE

=====

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of the National Council  
on Crime and Delinquency as Amicus Curiae  
is set forth in its Motion for Leave to  
File Brief as Amicus Curiae in Support of  
Respondent.

### QUESTIONS PRESENTED

Whether, under California's death-sentencing statute, the Eighth Amendment requires a court of statewide jurisdiction to conduct a "proportionality review"; and, if so, what are the essential features of a constitutionally satisfactory comparative sentence review process.

### SUMMARY OF ARGUMENT

Because of the degree of discretion California juries exercise in capital cases, some form of comparative sentence review--what this Court called "proportionality review" in Gregg v. Georgia--is constitutionally necessary under the California statute. Furthermore, although the circumstances of this case do not require the Court to prescribe in detail every facet of a constitutionally satisfactory sentence review, this Court should

identify those essential features necessary to satisfy the constitutional standard of preventing arbitrary, inconsistent, or capricious death sentences.

## ARGUMENT

### I.

UNLESS A STATE'S DEATH SENTENCING PROCEDURE INCLUDES SATISFACTORY ALTERNATIVE SAFEGUARDS, PROPORTIONALITY REVIEW IS CONSTITUTIONALLY REQUIRED IN DEATH PENALTY CASES

As the first question in its petition for certiorari, the Petitioner asks this Court to decide whether, as a per se rule, the Eighth Amendment always requires an appellate court of statewide jurisdiction to conduct in death penalty cases the type of comparative sentence review sometimes described as "proportionality review." See Proffitt v. Florida, 428 U.S. 242, 259 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality

opinion). Whether the California statute includes any particular procedure or safeguard is not the issue. The real question is whether, in light of all the procedures and safeguards established by the legislature, the statute as a whole is "capable of meeting Furman's constitutional concerns." Id. at 195. Furthermore, even if a given capital-sentencing statute is theoretically capable of preventing arbitrary, inconsistent, or capricious death sentences, as the Eighth Amendment requires, how its safeguards actually function in any particular case always remains open to challenge. Zant v. Stephens, 456 U.S. 410 (1982) (per curiam). See Godfrey v. Georgia, 446 U.S. 420 (1980).

What Furman v. Georgia, 408 U.S. 238 (1972), and this Court's subsequent decisions make clear is that, to be constitutional, a State's death-sentencing proce-

dure must satisfy at least four requirements. First, it must spell out legislatively mandated criteria which reasonably relate to the sentencing decision and which serve to identify those defendants convicted of murder who are eligible for the death penalty. Zant v. Stephens, \_\_\_ U.S. \_\_\_, 51 U.S.L.W. 4891 (No. 81-89, June 22, 1983). See also, Gregg v. Georgia, supra, 428 U.S. at 192-95 (plurality opinion); id. at 220-23 (White, J., concurring). Second, it must ensure that the sentencing decision is individualized and is based upon adequate information, especially concerning any mitigating circumstances or conditions that might affect the sentencing calculus. See Lockett v. Ohio, 438 U.S. 586, 600-05 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37 (1977) (per curiam). Third, it must provide adequate procedural

safeguards to ensure that the factual determinations upon which the sentencing decision is based conform to the applicable statutory criteria, Gregg v. Georgia, supra, 428 U.S. at 193-95 (plurality opinion), and are made in reliable manner. Beck v. Alabama, 447 U.S. 625, 637-38, 640-43 (1980); Lockett v. Ohio, supra, 438 U.S. at 601, 604 (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-62 (1977) (plurality opinion); id. at 363-64 (White, J., concurring). Fourth, it must also include safeguards to minimize the risk of arbitrary or capricious decisions and to ensure evenhanded and consistent sentencing in all capital cases. Zant v. Stephens, supra, 51 U.S.L.W. at 4895, 4898; Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion); Proffitt v.



Florida, supra, 428 U.S. at 253 (plurality opinion). See also, Furman v. Georgia, supra, 408 U.S. at 398-99 (1972) (Burger, C.J., dissenting). In other words, a constitutional death-sentencing system must genuinely narrow the class of murder defendants eligible for the death penalty on the basis of readily identifiable and verifiable criteria. It must also ensure that the power actually to impose the death penalty in death-eligible cases is exercised in a consistent and evenhanded manner.

By structuring his argument concerning the constitutional necessity for "proportionality review" in terms of a per se rule, the Petitioner ignores important differences in the procedural safeguards that various States have employed to satisfy these four requirements. For example, when enacting the statute upheld

in Jurek, the Texas legislature purported to establish a death-sentencing process which ensured that every defendant convicted of a capital crime who also satisfied the statutorily identified criteria embodied in three sentencing questions would receive a death sentence.<sup>1/</sup> Thus, the Texas statute limits the jury's sentencing function to deciding the factual inquiries

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<sup>1/</sup> Under Tex. Code Crim. Proc. Ann. Art. 37.071, if a jury convicts an accused of a capital crime, a further proceeding occurs. Following the introduction of additional evidence and argument, the jury decides the answers to the following three questions:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the defendant." Id. Art. 37.071(b).

upon which a death sentence is based, particularly with respect to a convicted capital defendant's potential for future violence. If the jury finds that each of the criteria embodied in the three sentencing questions is satisfied, imposition of the death penalty is automatic. Jurek v. Texas, supra, 428 U.S. at 269 (plurality opinion). Thus, the death penalty in Texas purports to be consistently and even-handedly imposed in every case in which the three sentencing questions are satisfied.<sup>2/</sup>

By contrast, the death-sentencing system adopted in Georgia, which this Court

---

<sup>2/</sup> Whether, as applied, the Texas statute actually achieves these results is a very different question. See Dix, Appellate Review of the Decision to Impose Death, 68 GEO. L. J. 97, 142-161 (1979); Dix, Administration of the Texas Death Prediction of Dangerousness, 55 TEXAS L. REV. 1343 (1977). See Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 CRIME AND DELINQUENCY 563, 593-601 (October 1980).

sustained in Gregg, gives the sentencing jury much greater discretion. See Zant v. Stephens, supra, 51 U.S.L.W., 4893-94. Although Georgia juries cannot direct imposition of a death sentence unless they make a specific finding that one or more of the aggravating circumstances set forth in the Georgia statute are present, Ga. Code Ann. § 27-2534.1(c), such a finding does not compel imposition of the death penalty. In Georgia, even in cases in which the statutory aggravating circumstances are present, the jury retains discretion not to impose a death sentence for any reason it chooses, or for no reason at all. Ga. Code Ann. § 26-3102. See Zant v. Stephens, supra, 51 U.S.L.W. at 4893; Gregg v. Georgia, supra, 428 U.S. at 203 (plurality opinion). Of course, because the Georgia statute gives this discretion to sentencing juries in capital cases, there is a very

real danger that inconsistent sentences may result. Different defendants, whose background and crimes are factually indistinguishable, may receive very different sentences from their respective juries--a possibility that, theoretically, does not exist under the Texas statute. For this reason, the Georgia legislature provided a further safeguard, "proportionality review":

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard against a situation comparable to that presented in Furman, the Supreme Court in Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face, these procedures seem to satisfy the concerns of Furman. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Gregg v. Georgia, supra, 428 U.S. at 198, quoting Furman v. Georgia, 408 U.S. at

313 (White, J., concurring). See also, id. at 203.

The Petitioner has suggested that, although "proportionality review" may provide a desirable additional safeguard under the Georgia statute, it is not constitutionally required. Such an argument overlooks the foregoing quotation, which appears in a portion of Justice Stewart's plurality opinion in Gregg that begins as follows: "We now turn to consideration of the constitutionality of Georgia's capital-sentencing procedures. . . . " 428 U.S. at 196 (emphasis added). It is also inconsistent with the Court's very recent decision in Zant v. Stephens, supra, which stressed that both the Gregg decision and the Stephens decision itself rested upon a presumption that Georgia's system of "proportionality review" would serve to vacate death sentences by Georgia

trial courts if they proved to be "excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances." 51 U.S.L.W. at 4898. See id. at 4894. Lastly, the Petitioner's argument also ignores this Court's earlier decisions in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), in both of which the absence of a comparative sentence review procedure by an appellate court of statewide jurisdiction contributed to this Court's determination that the death-sentencing procedures under review were constitutionally deficient. See 428 U.S. at 302-303, 334-336.

In other words, whether comparative sentence review by an appellate court of statewide jurisdiction is a constitutionally necessary component of any State's death-sentencing process depends on what other

safeguards, if any, that process employs to ensure evenhanded and consistent sentencing in capital cases. Thus, asking this Court to decide the constitutional necessity for "proportionality review" in the abstract is unproductive. The important question is whether, given the sentencing procedures and other safeguards employed in capital cases by any particular State, a comparative sentence review is also required in order to ensure evenhanded sentencing and thereby to satisfy the constitutional concerns expressed in Furman v. Georgia.

## II.

UNDER CALIFORNIA'S DEATH-SENTENCING STATUTE, INDIVIDUAL JURIES EXERCISE SUBSTANTIAL DISCRETION, MAKING COMPARATIVE SENTENCE REVIEW BY THE STATE SUPREME COURT A CONSTITUTIONAL PREREQUISITE

In order to decide whether an appellate court of statewide jurisdiction must conduct a comparative sentence review in



capital cases under California's death penalty statute, one must determine the degree of sentencing discretion exercised by California juries. If the California statute makes the death penalty automatic in any case in which the jury finds certain statutory criteria to be satisfied, then, as in Texas, "proportionality review" might not be constitutionally required. If, however, sentencing juries in California exercise a discretion in death penalty cases that exceeds straight-forward fact determination, "proportionality review" or some equivalent appellate safeguard is constitutionally necessary.

A review of the California legislation applicable to Respondent's case indicates that California juries do exercise substantial sentencing discretion. Under the California law, the conviction of a capital offender triggers a two-step sentencing

process. First, the sentencing jury must decide whether certain statutorily defined aggravating criteria are present in the defendant's case. Cal. Penal Code § 190.1 (a) (1977). If the jury finds such "special circumstances" to exist, the defendant becomes death-eligible, and a further sentencing proceeding will occur. Ca. Penal Code §§ 190.1(b), 190.3 (1977). At this proceeding, each side can offer additional evidence of an aggravating or mitigating character and argue the appropriate penalty. The jury then retires to determine the existence of any aggravating or mitigating circumstances and to decide whether the aggravating features of the case or of the defendant's background sufficiently outweigh any mitigating circumstances to justify a death sentence. Significantly, even if these deliberations result in imposition of a death sentence,

California law does not require the jury itself to make any specific findings. Rather the trial judge, who reviews the jury's sentence in connection with an automatic motion to modify the verdict, prepares written findings on the basis of the record which specify the aggravating and mitigating features of the case and give his reasons for finding that the evidence supports the jury's sentence. Cal. Penal Code § 190.4(e). See Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982) (per curiam).

In certain important respects, the California death penalty statute requires sentencing juries to engage in deliberations that resemble those prescribed for sentencing judges under the Florida statute approved in Proffitt v. Florida, supra. Each statute requires the sentencing authority to identify and to balance

against one another the aggravating and mitigating features of the particular case. It is quite likely that this similarity in procedure exists because the Florida and California legislatures both considered the recommendations of the American Law Institute's Model Penal Code when enacting their respective statutes. Section 210.6 of the Model Penal Code, which addresses the sentencing procedure to be employed in capital cases, specifically identifies the appropriate criteria that the sentencing authority should consider and directs the judge or jury to weigh the aggravating and mitigating features found to exist in each case when deciding whether to impose a death sentence. 2 AMERICAN LAW INST., MODEL PENAL CODE AND COMM. 107-110 (1980).

It is also apparent that the task of identifying and weighing against one another the aggravating and mitigating

features of a particular case is most delicate, entailing the exercise of a substantial degree of discretion. See California v. Ramos, \_\_\_ U.S. \_\_\_, 51 U.S.L.W. 5220, 5225 (No. 81-1893, July 6, 1983); McGautha v. California, 402 U.S. 183, 204-208 (1971). Because of the likelihood that different Florida trial judges would perform this task differently in factually indistinguishable cases, resulting in the imposition of inconsistent sentences in violation of Furman, the Florida Supreme Court has undertaken the responsibility for conducting a form of comparative sentence review in death penalty cases similar to that conducted by the Georgia Supreme Court. See Proffitt v. Florida, supra, 428 U.S. at 250-251 (plurality opinion). Although the Petitioner contends that no such form of comparative sentence review by the Florida Supreme

Court, intended to ensure evenhanded sentencing, is constitutionally necessary, Proffitt is to the contrary. When concluding that, "[o]n its face, the Florida system thus satisfies the constitutional deficiencies identified in Furman," 428 U.S. at 253, Justice Powell catalogued the major features of the Florida statute as follows:

Under Florida's capital sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Id. at 253, quoting Gregg v. Georgia, 428 U.S. at 188, quoting Furman v. Georgia, 408 U.S. at 313 (White, J., concurring) (emphasis added). See also Barclay v.

Florida, \_\_\_\_ U.S. \_\_\_\_, 51 U.S.L.W. 5206, 5211 (No. 81-6908, July 6, 1982)(plurality opinion)(decision affirming a Florida death sentence on constitutional grounds is "buttressed" by Florida Supreme Court's practice of conducting a comparative sentence review).

Consequently, if some form of "proportionality review" by the Florida Supreme Court is a constitutionally essential component of Florida's death sentencing procedure, as the Proffitt plurality opinion indicates, the same constitutional requirement should certainly apply to California's very similar statute. In fact, the argument that some form of comparative sentence review is constitutionally necessary under the California statute becomes even more compelling when one considers two important differences between the Florida and the California procedures.

The first difference concerns the identify of the sentencing authority. Under the California statute, the jury decides whether a convicted capital offender, whose case involved one or more statutorily defined "special circumstances," should receive a death sentence. In Florida, by contrast, the trial judge makes the sentencing decision. As this Court emphasized in Proffitt, trial judges are necessarily more experienced as sentencers than are layperson juries, and, presumably, judges should impose more consistent sentences than juries in capital cases. 428 U.S. at 252 (plurality opinion). Nevertheless, despite this greater assurance of consistent sentencing under the Florida statute, both the Florida Supreme Court and this Court deemed the further safeguard of "proportionality review" also to be necessary. To an even



greater degree, therefore, the same safeguard of comparative sentence review by an appellate court of statewide jurisdiction is constitutionally necessary under the California statute, which delegates the death-sentencing function to inexperienced, lay-person juries.

The second difference between the California and Florida procedures affects the degree of sentencing discretion and the concomitant risk of inconsistent sentences in factually similar cases. Under the Florida statute, the sentencing judge must personally make the specific factual findings upon which a death sentence is based. Fla. Stat. Ann. § 921.141(3). In this way, the Florida procedure enhances the ability of a reviewing court to determine the sufficiency of the evidence supporting the sentence imposed--thus ensuring the factual reliability of the

sentencing process--and to conduct a comparative review of the sentences imposed in similar cases, as the Eighth Amendment requires. See Gregg v. Georgia, supra, 428 U.S. at 195.

By contrast, under the California statute, the sentencing jury is under no such obligation. The specific findings of fact supporting a death sentence are the product, not of the sentencing jury's own deliberations, but of the trial judge's review of the evidence pursuant to the automatic motion to reconsider established by Section 190.4(e) (1977). In the proceedings below, the Respondent argued that the California statute was constitutionally deficient in this respect because it did not require the sentencing jury itself to make the necessary findings. The Court of Appeals divided over that issue, which is not presently before this Court. See

Harris v. Pulley, supra, 692 F.2d at 1195-96, 1204-05. However, that the California statute requires no written findings by the jury itself at the death-sentencing stage underscores the need for additional procedural safeguards in order to vindicate the constitutional requirement of evenhanded sentencing that lies at the core of the Furman decision.

In other words, to satisfy the Eighth Amendment, California must provide the Respondent with a variety of procedural safeguards, including meaningful appellate review. Given the degree of discretion the California statute affords to sentencing juries in the context of weighing aggravating and mitigating factors, see California v. Ramos, supra, 51 U.S.L.W. at 5225, and given the absence of any requirement that the sentencing jury itself make factual findings supporting the imposition of a

death sentence, some form of comparative sentence review by an appellate court of statewide jurisdiction is essential to satisfy this requirement. In no other way can California possibly assure the Respondent that his case, in which a jury chose to impose the death sentence, is distinguishable in some principled way from the many other cases in which other juries imposed sentences of only life imprisonment. See Godfrey v. Georgia, supra, 446 U.S. at 433 (plurality opinion).

### III.

THIS COURT SHOULD IDENTIFY AS THE CONSTITUTIONALLY ESSENTIAL FEATURES OF COMPARATIVE SENTENCE REVIEW THE REQUIREMENTS THAT REVIEWING COURTS MUST CONSIDER MITIGATING FACTORS WHEN SELECTING "SIMILAR" CASES AND THAT THE FREQUENCY WITH WHICH FACTUALLY INDISTINGUISHABLE DEFENDANTS RECEIVE LIFE SENTENCES SHOULD GOVERN THE DETERMINATION OF EVENHANDEDNESS

In the event of a ruling that California cannot execute the Respondent without

conducting a constitutionally satisfactory comparative sentence review, the Petitioner invites the Court to prescribe a detailed blueprint of the sentence review process. For two reasons, this Court should accept that invitation with caution.

First, detailing how appellate courts should conduct comparative sentence reviews in capital cases is wholly unnecessary in the present circumstances of this litigation. In particular, if this Court concludes that California law itself requires a comparative sentence review, as the Respondent has argued, an advisory opinion by this Court telling California judges how to perform a state-mandated procedure would obviously be inappropriate.

Second, this Court should also be aware that, by legislation or court rule, more than 20 States have adopted some form of comparative sentence review in capital

cases.<sup>3/</sup> That so many jurisdictions have seen fit to incorporate "proportionality review" into their statutory procedures

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3/ See, e.g., ALA. CODE tit. 134, § 5-53 (b)(3) (Michie Cum. Supp. 1981); CONN. GEN. STAT. ANN. § 53a-466(b)(3) (West Cum. Supp. 1982); DEL. CODE ANN. tit. 11, § 4209 (g)(2)(a) (1979); KY. REV. STAT. ANN. § 532.075(3)(c) (Baldwin Supp. 1980); LA. CODE CRIM. PRO. ANN. art. 905.9 (West Supp. 1980); LA. SUP. CT. R. 28(1)(c); MD. ANN. CODE art. 27, § 414(e)(4) (Supp. 1980); MISS. CODE ANN. § 99-19-105(3)(c) (Supp. 1979); MO. ANN. STAT. § 563014.3(3) (Vernon 1979); MONT. REV. CODE ANN. § 46-18-310(3) (1979); NEB. REV. STAT. § 29-2521.03 (1979) (review of sentences in all cases involving criminal homicide); NEV. REV. STAT. § 177.055(2)(d) (1979); N.H. REV. STAT. ANN. § 630.5(VII)(c) (Supp. 1979); N.M. STAT. ANN. § 31-20A-4 C(4) (Supp. 1980); N.C. GEN. STAT. § 15A-2000(d)(2) (1978); OKLA. STAT. ANN. tit. § 701.12(c) (3) (West Supp. 1980-1981); 18 PA. CONS. STAT. ANN. § 1311(h)(3)(iii) (Purdon Supp. 1980); S.C. CODE § 16-3-25(C)(3) (Supp. 1979); S.D. CODIFIED LAWS 23A-12(3) (1979); TENN. CODE ANN. § 39-2406(c)(4) (Supp. 1980); VA. CODE § 17-110.1(C)(2) (Supp. 1980); WASH. REV. CODE ANN. §10.94.030(3)(b) (Supp. 1980); WYO. STAT. §6-4-103(d)(iii) (1977); cf. NEB. REV. STAT. § 29-2522(3) (1979) (one factor which judge or judges must consider prior to imposing sentence).

attests to its perceived efficacy as a safeguard against arbitrary or inconsistent death sentences. It also underscores the interest of many other States besides California in the disposition of this case. Of course, as one might expect, the manner in which different courts actually conduct comparative sentence reviews is by no means uniform. In part, these variations in procedure have occurred because of idiosyncracies of state law; in part they are the natural consequences of experimental efforts by different States to develop optimal procedures in the light of their respective caseloads. Thus, any pronouncement by this Court concerning the essential characteristics of a proper sentence review should take into account the existence of these legitimate variations.<sup>4/</sup>

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<sup>4/</sup> Funded in part by the National Institute of Justice, the National Center

Nevertheless, this Court can substantially facilitate the efforts of different States to develop a constitutionally satisfactory sentence review process by identifying at this time certain basic features that such a process must include. These features are constitutionally required because they are essential to the perform-

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4/ continued

for State Courts is presently engaged in a major project to develop a model proportionality review procedure for use by different States. The basic objectives of the project are to develop practical, workable methods for selecting factually similar cases for comparative purposes and to assist State Supreme Courts in deciding important procedural questions that must be resolved in order to conduct the review process. In addition, empirical studies of how different State Supreme Courts actually administer their death-sentencing procedures are presently underway in at least four States, California, Georgia, Mississippi, and North Carolina. To the extent that the observations and procedures that result from these efforts can inform this Court's pronouncements concerning the proper method of comparative sentence review, prudence dictates avoiding any premature exposition.



ance of the ultimate objective of comparative sentence review: ensuring the even-handed administration of the State's capital-sentencing statute. See Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion).

More specifically, the purpose of a comparative sentence review is to ensure that no defendant is subjected to capital punishment if other defendants whose cases cannot be meaningfully distinguished generally receive less severe sentence. See Gregg v. Georgia, supra, 428 U.S. at 198 (plurality opinion). Thus, in order to make this determination, the reviewing court must first identify the other cases which are comparable to the death sentence case under review. Of course, determining the specific criteria on the basis of which a reviewing court should select other cases as "similar" can be a complicated question.

More than one method may be appropriate, depending in part upon the particular objectives that prompted the legislature of any given State to adopt capital punishment.

One method that courts now employ is to select other cases as "similar" on the basis of factual similarity to the death sentence case under review. Another method is to assess the overall culpability or blameworthiness of the defendant in the review case and to select as comparable the cases of other defendants whose offense and records make them equally culpable. See, generally, Baldus, Pulaski, Woodworth, and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 STAN. L. REV. 1, 22-52 (1980). In either case, however, it is essential that the reviewing court conduct a sufficiently thorough search for other cases

satisfying the comparability criteria being employed so that the ultimate objective of the review process--ensuring evenhanded sentencing--is assured.

Viewed from this perspective, the proper scope of a reviewing court's search for "similar" cases becomes relatively clear. First, the reviewing court must scrutinize other cases arising anywhere within the same State. It should not, as the Louisiana Supreme Court now does, restrict its search only to cases from the same geographic subdivision of the State as the death sentence case under review. See La. S.Ct. R. 28(1)(c). Despite the ruling in Williams v. Maggio, 679 F.2d 381, 394-95 (5th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 51 U.S.L.W. 3920 (No. 82-5868, June 27, 1983), such a geographic restriction on the search for "similar" cases prevents the sentence review process from en-

suring evenhanded sentencing on a statewide basis, which is what Furman requires. Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion). After all, the Furman prohibition of arbitrary or inconsistent sentences in capital cases arises because of the Eighth Amendment's prohibition of cruel and unusual punishment, which applies to the States themselves. Robinson v. California, 370 U.S. 660, 666-67 (1962). Indeed, that defendants in factually indistinguishable cases received life or death sentences depending solely on the region within a given State in which each was convicted would be a paradigm of the arbitrary and capricious sentencing that Furman condemned. See Bowers and Pierce, supra at 601-09. It is undoubtedly for these reasons that this Court's prior discussions of the comparative sentence

review process have always endorsed the performance of such a review by an appellate court of statewide jurisdiction. Zant v. Stephens, supra, 51 U.S.L.W. at 4894, 4898; Proffitt v. Florida, supra, 428 U.S. at 269-61 (plurality opinion) ("because of its statewide jurisdiction, [the Florida Supreme Court] can assure consistency, fairness, and rationality in the evenhanded operation of the state law"); Gregg v. Georgia, supra, 428 U.S. at 198, 204-06 (plurality opinion).

Second, a constitutionally satisfactory comparative sentence review also requires the reviewing court to extend its search for "similar" cases to all cases that might satisfy the comparability criteria being employed regardless of the sentence imposed. Cf. Zant v. Stephens, supra, 51 U.S.L.W. at 4895 n.19 (citing with approval the Georgia Supreme Court's avowed practice

of considering for comparative purposes both similar life sentence and similar death sentence cases). Apparently, a few state courts limit their search for "similar" cases to other cases which resulted in death sentences. Such a restriction is obviously inconsistent with the notion that what the Eighth Amendment condemns are death sentences in cases that one cannot distinguish on any principled basis from other cases that resulted in life sentences. See Godfrey v. Georgia, supra, 446 U.S. at 433 (plurality opinion); Gregg v. Georgia, supra, 428 U.S. at 198 (plurality opinion).

The notion that evenhanded sentencing is assured so long as the reviewing court identifies at least one other "similar" case that resulted in a death sentence, see, e.g., Goode v. Wainwright, 704 F.2d 593, 603 (11th Cir. 1983), reflects a

profound misconception of the function of a constitutionally satisfactory sentence review. The purpose of a comparative sentence review is not to search for one or more prior cases--"precedents," so to speak--that are comparable to the case under review and that also resulted in a death sentence. The review process can ensure evenhanded, consistent sentencing only if the reviewing court determines the frequency with which other defendants whose cases are "similar" have received life sentences. If most other defendants in "similar" cases are sentenced to death, imposing a death sentence in the case under review does not offend the constitutional requirement of evenhandedness. See Gregg v. Georgia, supra. 428 U.S. at 203 (plurality opinion). On the other hand, if other defendants in comparable cases receive death sentences with insufficient

regularity to implement the policy objectives which prompted the capital sentencing legislation, then the death sentence in the case being reviewed is constitutionally excessive. Furman v. Georgia, supra, 408 U.S. at 311-12 (White, J., concurring). Thus, ignoring "similar" cases which resulted in life sentences or limiting the review process to a "precedent-seeking" exercise is inconsistent with the constitutional function of comparative sentence review.

Third, the criteria that the reviewing court employs for selecting other cases as "similar" must incorporate both aggravating and mitigating features of the death sentence case under review. Clarifying this essential requirement of a constitutionally satisfactory comparative sentence review is important because, on occasion, state courts select other cases as "similar"



solely on the basis of a few aggravating factors. As a consequence, a death sentence imposed upon a defendant whose case includes one or more mitigating factors may be tested for consistency by comparison to the cases of other defendants who lacked any mitigating features and who, almost invariably, received death sentences themselves.

The requirement that mitigating circumstances must receive due consideration in the context of sentence review is essential to ensure evenhanded administration of a capital-sentencing statute. This Court has repeatedly affirmed that sentencing decisions in capital cases must involve individualized consideration of all relevant circumstances, particularly any mitigating features. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra, 438 U.S. at 602-605 (plurality opinion). However,

Furman v. Georgia and its progeny also affirm the requirement that the discretion necessary to permit individualized sentencing must be channeled and restricted to ensure consistency and evenhandedness. Thus, those States which employ the comparative sentence review process as a means of achieving evenhandedness must conduct that process in a manner that takes into account all the important factors that sentencing authorities themselves should consider.

To be sure, this requirement may make the process of selecting "similar" cases in a manner that ensures consistency somewhat more extensive. However, the magnitude of the task will vary substantially depending upon the number of prior capital cases in the same State, and, even in States with a large number of potentially "similar" cases, once the reviewing court has established appropriate selection proce-

dures, the task is basically mechanical. Furthermore, the use of quantitative methods or computer-assisted selection processes could substantially reduce the effort required and improve the thoroughness and efficacy of the sentence review process. See Baldus, et al., supra at 68-70. Most importantly, however, by conducting comparative sentence reviews in a manner that conforms to the three essential requirements previously described, State supreme courts can substantially minimize the task that discretionary capital-sentencing decisions by individual judges or juries will produce the arbitrary and inconsistent sentencing results that this Court has consistently condemned since the Furman decision.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

CHARLES A. PULASKI, JR.  
Arizona State University  
College of Law  
Tempe, Arizona 85287  
(602) 965-6463

COUNSEL FOR AMICUS CURIAE  
The National Council on  
Crime and Delinquency

No. 82-1095-CFH  
Status: GRANTED

Title: R. Pulley, Warden, Petitioner  
V.  
Robert Alton Harris

Docketed:  
December 29, 1982

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Wellington, Michael D.

Counsel for respondent: Amsterdam, Anthony G.

Entry	Date	Note	Proceedings and Orders
1	Dec 29 1982	G	Petition for writ of certiorari filed.
2	Dec 29 1982		Appendix of petitioner R. Pulley, Warden filed.
3	Dec 29 1982		Record filed.
4	Dec 29 1982		10 copies of lodging in blue folder.
5	Mar 2 1983		DISTRIBUTED. March 18, 1983
7	Mar 4 1983	X	Brief of respondent in opposition filed.
8	Mar 4 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Mar 11 1983		DISTRIBUTED. March 18, 1983. (Above motion)
10	Mar 21 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Mar 21 1983		Petition GRANTED. *****
13	Apr 26 1983		Order extending time to file brief of petitioner on the merits until May 19, 1983.
14	May 21 1983		Brief of petitioner filed.
15	May 21 1983		Joint appendix filed.
16	May 28 1983		Record filed.
17	May 28 1983		Certified copy of C.A. proceedings received.
19	Jun 20 1983		Order extending time to file brief of respondent on the merits until July 22, 1983.
20	Jul 22 1983	G	Motion of The National Council on Crime and Delinquency for leave to file a brief as amicus curiae filed.
21	Jul 22 1983		Brief of respondent Robert Alton Harris filed.
22	Aug 2 1983		CIRCULATED.
23	Aug 4 1983		Record filed.
24	Aug 4 1983		Certified original record, 3 volumes, received.
25	Sep 8 1983		Motion of The National Council on Crime and Delinquency for leave to file a brief as amicus curiae GRANTED.
26	Sep 21 1983		SET FOR ARGUMENT. Monday, November 7, 1983. (3rd case) (1 hour)
27	Oct 26 1983	X	Reply brief of petitioner R. Pulley, Warden filed.
28	Nov 7 1983		ARGUED.